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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1993

MARY ANN CARTER RENNIE and
RICHARD L. DARST,

Petitioners

v.

JOHN DALTON, Secretary of the Navy,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether The District Court In Deciding Whether There Was A Hostile Work Environment Must Consider The Totality Of The Circumstances, Instead Of Just One Fact.

2. Whether The Seventh Circuit Erred In Using The Legal Standard Of *Harris v. Forklift Systems. Inc.*, 976 F.2d 733 (6th Cir. 1992), Which The Supreme Court Reversed After The Opinion Below.

3. Whether The Disparate Treatment Of A Female Employee Being Placed Behind A Blackboard During A Two Day Test By A Male Instructor As A "Childish" Response To Her Complaint Of Sex Harassment, Which Resulted In A Lower Test Score Than Her Previous Test Score, Can Qualify As Adverse Treatment?

4. Whether Sanctions Can Be Imposed When No Prior Motion, Notice, Or Opportunity To Respond Was Given Before The Decision Was Made To Impose Sanctions.

5. Whether Sanctions Can Be Imposed On The Basis That Only Credibility Issues Were Raised, When In Fact No Credibility Issue Was Raised, And Whether Sanctions Can Be Imposed On Hostile Environment Issues When The Supreme Court Was Considering Those Issues.

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PETITION FOR WRIT OF CERTIORARI

Mary Ann Carter Rennie and Richard L. Darst respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 3 F.3d 1100. The Order of that court dated October 14, 1993 entering the amount of sanctions is unreported. The district court's judg-

ment and findings of fact and conclusions of law are unreported. All of those opinions and orders are set forth in the appendix.

JURISDICTION

The date of the entry of the judgment of the court of appeals sought to be reviewed is August 27, 1993. There is no order on a rehearing. No extension of time within which to file the petition for writ of certiorari was sought or granted. This petition for writ of certiorari is timely in that it was filed prior to the expiration of ninety (90) days after the opinion of the court of appeals as provided by Rule 13 of the Rules of the Supreme Court.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. 1254(1) for a petition for writ of certiorari to the court of appeals. The jurisdiction of the court of appeals was invoked pursuant to 28 U.S.C. 1291 as an appeal from a final decision of the district court. The district court had federal question jurisdiction pursuant to 28 U.S.C. 1331 and civil rights jurisdiction pursuant to 28 U.S.C. 1343.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The statute prohibiting sex discrimination is 42 U.S.C. § 2000e-2(a) which provides as follows:

> "It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his

status as an employee, because of such individual's race, color, religion, sex, or national origin."

The statute prohibiting retaliation is 42 U.S.C. § 2000e-3(a) which provides as follows:

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

The regulation defining sex harassment and the standard of review is 29 C.F.R. 1604.11(a) and (b) which provides as follows:

"(a) Harassment on the basis of sex is a violation of section 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

"(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis."

STATEMENT OF THE CASE

A. Factual Background

In 1982 Mary Ann Carter Rennie (hereafter "Petitioner") was employed by the respondent employer at his Indianapolis, Indiana facility called the Naval Avionics Center (NAC). Petitioner and other employees were required by the employer to take a soldering class and to pass a written test and a hands-on soldering test. Petitioner passed the written test, but she did not pass the soldering test. She took the same hands-on soldering test a second time and scored lower the second time.

Petitioner's first soldering class was taught by a part-time temporary instructor, Cafrelli, whose regular job with the employer was as an electronics mechanic. Tr. III-446. The employee students consisted of two males and two females.

The employer's classroom was very "cramped and small" and it was difficult for more than one person to move around at the same time. App. to Pet. for Cert. A-3. On the first day of class the instructor told an ill-advised off-color joke. A-4. The instructor was rebuked by the other female in the class for his actions, and the instructor apologized to the female and to the class for his exercise of poor judgment and bad taste. A-5.

The instructor participated in a conversation about a strip tease bar called the Harem House. A-4. He said that someone had "paid five dollars and didn't even get a feel." A-4. He also discussed Scarlet's Strip Bar. A-4. The Petitioner tried to ignore such comments. The district court found that the off-color joke and the discussion regarding the strip bar were not directed towards Petitioner and she did not complain to the instructor about them. A-4, A-25.

After telling the off-color joke to the class and talking about getting a feel from a woman, the instructor paid additional attention to Petitioner, who was having difficulty with the soldering. A-26. The instructor sat close to Petitioner in the cramped room. A-26. The instructor did favors for Petitioner. The instructor let Petitioner smoke, which was against the

employer's policy. A-26. The instructor wrote two answers on Petitioner's written examination, with the excuse that he did so when the student did not understand the question. A-27. The instructor reattached Petitioner's lacing on her chassis on which she was soldering during her test. A-27.

After giving favors to Petitioner, the instructor asked her if she appreciated how he was trying to help her, but she rejected his request to show him appreciation. A-5. Petitioner complained to two students, one male and one female, that the instructor was making her nervous. A-5, A-26. The other female in the class told the instructor that Petitioner complained that he was making Petitioner nervous. Tr. III-512. The other female testified that when the instructor was around Petitioner, Petitioner got more nervous and defensive, but it did not appear that the instructor was "sexually harassing" Petitioner in any way. Tr. II-393. The male employee student with whom Petitioner went on some dates, testified that Petitioner was nervous during the class, but Petitioner was not nervous outside of class. Tr. III-420-425.

The instructor told Petitioner's branch manager that Petitioner was "making veiled threats to" the instructor. Pl. Ex. 4. The branch manager described the instructor as "pretty well agitated." Tr. I-147.

After the appellant rejected the instructor and complained about him, the instructor graded every student's soldering test but hers. "The instructor declined to grade plaintiff's first soldering examination because he felt plaintiff had exhibited an animosity towards him." A-27. The instructor sent petitioner's soldering test to the higher level without any instructor's grade, and it was the only one sent to the higher level without any instructor's grade. A-27. Petitioner's test which was not graded by her instructor received a score of thirty-eight from the higher level called Quality Audits. A-5. A score of seventy was needed to pass.

The district court found that during "the first soldercation course" (A-25), the Petitioner "lacked the manual dexterity

necessary to meet the NAC soldering standards" (A-26), but the court did not determine that the lack of manual dexterity during the first class was due to some cause independent of the instructor making her nervous during class. The district court made no finding of whether the actions of the instructor had an effect on the performance of Petitioner during her hands-on soldering test.

Petitioner was required by the employer to take the soldering class a second time from the same instructor who had refused to grade her first soldering test. The instructor required petitioner to sit directly in front of his desk. After her repeated requests to be able to move away from him, the instructor allowed her to move her seat. Tr. III-534. Petitioner's performance in the second class demonstrated marked improvement. A-5. The instructor testified that "at the beginning of the class she was soldering properly." Tr. III-528. He testified that "during the graded portion of the test, she started making errors again." Tr. III-473.

Petitioner had told the instructor that she was considering filing an EEO complaint. A-5. The instructor perceived as a threat her statement about exercising such statutory right. A-5. The instructor went to his supervisor and characterized Petitioner's statement as "attempted intimidation." A-6. The instructor's supervisor told Petitioner's supervisor, and Petitioner told her supervisor that she had a small problem, but it was taken care of. A-6. The instructor had words with Petitioner again, and Petitioner filed an EEO complaint.

The Petitioner's branch manager told the instructor to stay away from the classroom and testified as follows:

> "I asked him to be away from the area. I didn't want him to be in the room if he could help it. Because the room is really not a large room; it is a small classroom and just being in the room, if she was feeling intimidated by him, would have created the same problem. So I asked him to be out of the area."

Tr. I-126-127; A-6. No one else was assigned to instruct Peti-

tioner, even though Larry Songer, who instructed the temporary instructor, was still employed by defendant. The temporary instructor did not stay away from Petitioner, and he aggravated the situation through a "childish" response to her complaint by pulling a blackboard in front of the Petitioner for two days. The instructor did not tell Petitioner's branch manager that he pulled a blackboard in front of Petitioner before the branch manager fired Petitioner for failing the second test. Tr. I-131-132.

The instructor stayed in the room during the test in order to monitor the students and answer questions but he placed a movable blackboard between himself and Petitioner to prevent any further accusations of staring. A-6. It was unknown where the instructor got the idea to place a blackboard between himself and the female. A-6. The hands-on soldering test was an open-book type of test in which the students could ask questions and seek advice. The district court found that "although moving the blackboard may have been a somewhat childish response to the problem, the instructor was still available to the students and it was plaintiff who made the concious (sic) decision not to ask for his assistance." A-45. The court of appeals agreed. A-15.

During the hands-on exam, Petitioner sought assistance from the male student in the class, but the instructor prohibited this, claiming that if she were to fail it could be because of the male's incorrect advice. A-7. The instructor testified that he observed that Petitioner's hands were shaking during the exam. A-7. After the second test, the instructor graded Petitioner's test with a forty-five score and Quality Audits graded it with a twenty-six score, lower than her first score by Quality Audits on the very same test.

Petitioner was terminated from employment on May 8, 1982 because she failed the soldering test. The employer looked in its other branches and divisions for job openings for a male in another branch who complained about dyslexia and the employer found a job for him in Petitioner's branch. The

employer did not look for any openings in other branches and divisions for the female Petitioner who complained about sex harassment. Tr. I-140-142. The employer refused to rehire Petitioner at any time because she failed the soldering course twice. After Petitioner was terminated by defendant, she was again rated by a subsequent employer as doing good soldering. Pl. Ex. 14.

B. The Proceedings Below

The administrative proceedings considering the case of Petitioner lasted until 1986. Petitioner received a notice of right to sue on about August 8, 1986. She filed her first complaint in district court in cause number IP 86-1082-C on September 5, 1986, alleging sex discrimination and retaliation in violation of 42 U.S.C. 2000e-2 and 2000e-3. The district court had jurisdiction pursuant to 28 U.S.C. 1331 and 1343. On motion of the defendant, the district court dismissed her retaliation claims on the ground that she had not filed a second administrative complaint for retaliation. The court of appeals reversed the dismissal, holding that the equitable tolling exceptions available to employees of private employers are also available to employees of federal government employers. *Rennie v. Garrett*, 896 F.2d 1057 (7th Cir. 1990). The Supreme Court later reached the same conclusion in *Irwin v. Veterans Administration*, 498 U.S. 89 (1990).

After the dismissal of the retaliation claims and during the pendency of the appeal of that dismissal, Petitioner filed a second administrative complaint and district court complaint for retaliation in cause number IP 88-652-C. After the reversal of the first dismissal, the parties agreed and the court ordered that the complaint in the second case serve as the amended complaint in the first case. The two cases were consolidated for trial as if one case. R. IP 88-652-C 10.

The district court held the trial on September 4, 5, 9, and 10, 1991. The court ordered a briefing schedule for plaintiff's proposed findings of fact and conclusions of law, defendant's proposed findings of fact and conclusions of law, plaintiff's post-

trial brief, defendants' post-trial brief, and plaintiff's reply brief, which were submitted to the district court. The district court ordered oral arguments on the briefs, and oral arguments were presented to the trial court on May 12, 1992. On June 11, 1992, the court entered findings of fact, conclusions of law, and judgment for the defendant. R. 515, 516.

On July 10, 1992, plaintiff appealed from the judgment. R. 517. On August 27, 1993 the court of appeals affirmed the judgment for the defendant. The same opinion ordered, without any prior motion, notice, or opportunity to respond, that "(w)e are of the opinion that sanctions are appropriate under Rule 38 in this case for the very same reasons we stated in *District No. 8, Int'l Assoc. of Machinists & Aerospace Workers, AFL-CIO*, 807 F.2d 618 (7th Cir. 1986) . . . ." A-19. The same opinion also ordered that "we direct that her appellate counsel, who should have known the appropriate legal standards, pay the appellee defendant's costs and reasonable attorneys' fees stemming from this appeal." A-19. The opinion directed appellant's counsel to file a "response to sanctions" and directed appellee's counsel to file an accounting of attorney's fees and costs incurred in this appeal. A-19.

Appellant's counsel informed the appellant that he could no longer represent her, because he was defending himself against sanctions for representing her. Appellant did not file a petition for rehearing of the opinion of August 27, 1993.

The appellant's counsel filed a response to sanctions on September 13, 1993. The appellee's counsel filed an accounting on September 15, 1993. The court of appeals issued the mandate to the district court on September 20, 1993.

By Order dated October 14, 1993, the court of appeals ordered appellant's counsel to pay $7,370.00 in attorney fees plus costs in the amount of $520.62. A-21-22. Within fourteen days of the final order on attorney fees and costs, appellant's counsel submitted a petition for rehearing of the final sanction. The clerk of the court refused to file the petition for rehearing on the ground that the court of appeals has no jurisdiction after

the issuance of the mandate. The appellant's counsel submitted a motion to recall the mandate and motion to file petition for rehearing instanter. The court of appeals has not filed the motion or ruled on the motion.

After the opinion of August 27, 1993, the Supreme Court issued the decision of *Harris v. Forklift Systems, Inc.*, __ U.S. __ (1993) reversing the law in the Sixth and Seventh Circuits on hostile environment. Appellant's counsel has an obligation to file this petition for writ of certiorari for his client in addition to himself, and thus, he is doing so.

REASONS FOR GRANTING THE WRIT

I. The District Court In Deciding Whether There Was A Hostile Work Environment Must Consider The Totality Of The Circumstances, Instead of Just One Fact.

In making its decision on the issue of whether there was a hostile work environment, the district court made the following conclusion of law:

> "13. While the instructor showed a lack of judgment in telling an off-color joke, the Court finds it did not create a hostile environment in that a reasonable woman would not have allowed the telling of one off-color joke to interfere with her work performance."

A-37. At other places in its findings of fact and conclusions of law, the court found other facts to have been proven. However, in making its final determination of the hostile environment issue and determining whether a reasonable woman would have been affected, the court did not consider those facts. The appellant appealed and requested that the other facts found by the trial court be considered in this determination, and that the totality of the circumstances be considered instead of just one fact.

For example, the court did not consider on the reasonable person issue the instructor's discussion of someone going to the Harem House strip tease bar and paying five dollars and not

getting a feel. The court did not consider how a reasonable woman would have felt after hearing the joke and the statement about not getting a feel, when the instructor later came and sat next to Petitioner in the "cramped and small" room. The court did not consider how a reasonable woman would have felt after those events and then seeing the instructor write two answers on her written examination and reattach lacing to her soldering chassis and then telling her that she should appreciate what he had done for her. The court did not consider whether her lack of manual dexterity during the first class was due to the instructor making her nervous. The court did not consider how a reasonable woman would have felt after complaining about the instructor and having the instructor refuse to grade her soldering test because she had "exhibited an animosity towards him." A-27. The court did not consider the effect of sending a soldering test to a higher level without any instructor's grade, when every other soldering test had an instructor's grade. The district court did not consider any of the undisputed facts in deciding the hostile environment issue, other than the one joke early in the first class.

The recent decision of *Harris v. Forklift Systems, Inc.*, — U.S. —, 62 U.S.L.W. 4004 (1993) plainly stated as follows:

> "But we can say that whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances."

62 U.S.L.W. at 4405.

The *Harris* decision is a reaffirmation of the decision of *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) which required the district courts to determine the existence of sexual harassment in light of the totality of the circumstances. That decision stated as follows:

> "The EEOC Guidelines emphasize that the trier of fact must determine the existence of sexual harassment in light of 'the record as a whole' and 'the totality of circumstances, such as the nature of the sexual advances and the

> context in which the alleged incidents occurred.' 29 CFR § 1604 .11 (b) (1985)."

477 U.S. at 69.

The district court in Petitioner's case did not examine the totality of the circumstances in making its determination of whether there was a hostile work environment. Instead, the district court separated and isolated the various facts which culminated in Petitioner complaining about the instructor making her nervous and the instructor refusing to grade her soldering test because of the animosity created. The district court did not consider some facts if they were considered in the discussion of other theories, such as quid pro quo. A-39. The district court must be ordered to consider all of the facts together in deciding whether there was a hostile environment.

Also, it must be remembered that Petitioner did not quit or declare a constructive discharge as was the case in *Harris*. See also *Meritor Savings Bank v. Vinson*, 477 U.S. at 60 (discharged after sick leave for an indefinite period). Thus, the sexual harassment required to be proven in Petitioner's case is not the sexual harassment severe enough to justify Petitioner quitting or taking sick leave for an indefinite period. She must only show that the sexual harassment affected her work, in this case her test, or created a hostile environment sufficient to complain about, but not necessarily sufficient to justify her to quit. A woman does not have to wait until she is forced to quit before she can complain about sex harassment.

II. The Seventh Circuit Erred In Using The Legal Standard Of *Harris v. Forklift Systems, Inc.*, 976 F.2d 733 (6th Cir. 1992), Which The Supreme Court Reversed After The Opinion Below.

The Seventh Circuit followed the legal standard used in the Sixth Circuit which has just been rejected by the Supreme Court. In *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989), the Seventh Circuit agreed with and adopted the Sixth Circuit standard which requires plaintiffs to prove "that the

defendants conduct would have interfered with a reasonable individual's work performance and would have affected seriously the psychological well-being of a reasonable employee." *Brooms*, 881 F.2d at 418-420, quoting *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). This standard was carried forward in *Swanson v. Elmhurst Chrysler Plymouth, Inc.*, 882 F.2d 1235 (7th Cir. 1989).

The court of appeals judged Petitioner's case against that standard. The court of appeals stated:

> "We have held that 'only if the court concludes that the conduct would adversely affect the work performance and the well-being of both a reasonable person and the particular plaintiff bringing the action may it find that the defendant has violated the plaintiff's rights under Title VII.' *Brooms v. Regal Tube Co.*, 881 F.2d 412, 419 (7th Cir. 1989); *Swanson*, 882 F.2d at 1238."

A-10-11. The Seventh Circuit required both an affect on the work performance and well-being.

The court of appeals opinion analyzed all of the elements of the claim as follows:

> "In *Swanson*, this court set forth a five-part test for a plaintiff to maintain a Title VII claim based on hostile work environment sexual harassment.
>
> > '(1) The employee was a member of a protected class; (2) the employee was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature; (3) the harassment complained of was based on sex; (4) the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance in creating an intimidating, hostile, or offensive working environment that affected seriously the psychological well-being of the plaintiff; and (5) the existence of respondeat superior liability.'
>
> "While Rennie satisfied a few of the elements of her

prima facie case ((1) she is a member of a protected class, (3) the harassment was based on sex, and (5) respondeat superior liability exists), she fell short of satisfying all of the required elements. The plaintiff failed to present any evidence of sexual advances much less any proof of requests for sexual favors. She instead bases her argument on one off-color joke and a conversation about a strip bar, but the district court found she failed to establish that either communication was directed at her personally. She also alleges that Cafrelli stared at her and touched her, however, the trial court found this to be untrue for if any staring or touching had occurred in the limited quarters of the classroom, the other students would have observed it. The record supports this finding.

"The plaintiff also failed to establish that the alleged sexual harassment 'had the effect of unreasonably interfering with [her] work performance in creating an intimidating, hostile, or offensive working environment that affected seriously [her] psychological well-being.' *Id.*[5] We are in agreement with the finding that Cafrelli's alleged conduct did not interfere with the plaintiff's work performance, for the record before us falls far short of demonstrating 'demeaning conduct and sexual stereotyping [resulting in] anxiety and debilitation to the plaintiff [such] that working conditions were 'poisoned' within the meaning of Title VII.' *Brooms*, 881 F.2d at 418 (quoting *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 213 (7th Cir. 1986). Likewise, Rennie has failed to demonstrate that Cafrelli's conduct would have adversely affected the work performance of a reasonable person. *Brooms*, 881 F.2d at 419. Since the court failed to find that sexual harassment occurred, a reasonable person certainly would not have been affected by Cafrelli's actions. *See Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1274 (7th Cir. 1991). Rather than attributing Rennie's poor performance to the alleged harassment, the trial court found that Rennie lacked the manual dexterity to meet the NAC soldering standards. We are in agreement with this finding and add further it is common knowledge that some individuals get very ner-

> vous during testing procedures especially when they are unprepared or lack the requisite skills. We are of the opinion that the alleged conduct was insufficient as a matter of law to support a harassment claim because an isolated joke and conversation about a strip bar, even though we might consider offensive and in very poor taste, were not 'persistent' nor did they 'poison' the work environment.' Based upon our review of the record, we hold that the district court finding was not clearly erroneous and that the isolated incidents fall short of the requisite level of hostility or pervasiveness needed to establish a hostile work environment violation under Title VII."

A-11-13.

The opinion of the court of appeals also contained the following footnote 5.

> "[5] The Supreme Court has granted a petition for certiorari in a Sixth Circuit case in which the court dismissed a plaintiff's sexual harassment claim because the alleged conduct did not 'seriously affect [her] psychological well-being.' *Harris v. Forklift Systems, Inc.*, 1990 U.S. Dist LEXIS 20115 at *18 (Nov. 28, 1990), *aff'd*, 976 F.2d 733 (6th Cir. 1992), *cert. granted*, 113 S.Ct. 1382 (1983). While we have mentioned this element (affect on psychological well-being), our holding does not depend on it for not only did Rennie fail to present any evidence that the alleged conduct had a serious affect on her psychological well-being, but she also failed to establish that she 'was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature . . . .' *Swanson*, 882 F.2d 1238."

A-12. While the opinion states that its holding does not depend on the psychological well-being requirement, it actually does, because the opinion found that Petitioner had satisfied the element that "(3) the harassment was based on sex." A-11. The court of appeals' statement that Petitioner failed to establish that she was subjected to "verbal or physical conduct of a

sexual nature" is contradicted by its finding that Petitioner satisfied the element that "(3) the harassment was based on sex."

To the extent that the court of appeals required both "harassment based on sex" and "other verbal or physical conduct of a sexual nature," the opinion is in error. The finding of "harassment based on sex" is a broader finding than "other verbal or physical conduct of a sexual nature," which is a prefatory finding. The *Harris* decision does not require such double harassment based on sex. If there is "harassment based on sex," there is no need to prove "other verbal or physical conduct of a sexual nature." Harassment based on sex is what is unlawful.[1]

The district court also used the wrong legal standard which was in effect in the Sixth and Seventh Circuits at the time. The district court stated as follows:

> "6. An actionable level of conduct arises where the sexual harassment is 'sufficiently severe or pervasive' to alter the conditions of [the victim's] employment and create an abusive environment." *Meritor*, 477 U.S. at 67. The Seventh Circuit has interpreted 'abusive environment' to mean that 'the demeaning conduct and sexual stereotyping cause such anxiety and debilitation to the plaintiff that working conditions were 'poisoned' within the meaning of Title VII. *Brooms v. Regal Tube Co.*, 881 F.2d 412, 418 (7th Cir. 1989).
>
> "7. To determine whether working conditions are 'poisoned', a district court in the Seventh Circuit must examine the circumstances from both a subjective and objective standpoint. *Brooms*, 881 F.2d at 419. 'Only if the court concludes that the conduct would adversely affect the work performance and the well-being of both a reasonable person and the particular plaintiff bringing the action

[1] Also, compare footnote 5 of the opinion to footnote 6 which states that plaintiff testified that she believed that the temporary instructor wanted a sexual favor.

> may it find that the defendant has violated the plaintiff's rights under Title VII.' *Id.*"

A-36. The district court required that the conduct affect both the work performance and the well-being of the person, as erroneously required by *Brooms*. The EEOC guidelines and the Court in *Harris v. Forklift Systems, Inc.*, — U.S. —, 62 U.S.L.W. 4004 (1993) do not require that both be proven. Nor does *Harris* require "such anxiety and debilitation to the plaintiff that working conditions were 'poisoned'."

The Court in *Harris* rejected the requirement of an effect on a person's psychological well being or a "poisoned" environment. The *Harris* decision cited the Sixth Circuit *Rabidue* decision relied on by the Seventh Circuit as the source of the psychological well-being requirement, and rejected that decision. 62 U.S.L.W. at 4005. The Court stated as follows:

> "But Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employee's job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality. The appalling conduct alleged in *Meritor*, and the reference in that case to environments 'so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers,' *supra*, at 66, quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (CA5 1971, cert. denied, 406 U.S. 957 (1972), merely present some especially egregious examples of harassment. They do not mark the boundary of what is actionable.
>
> "We therefore believe the District Court erred in relying on whether the conduct "seriously affect[ed] plaintiff's psychological well-being" or led her to "suffe[r] injury."

> Such an injury may needlessly focus the fact-finder's attention on concrete psychological harm, an element Title VII does not require. Certainly Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct. So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, *Meritor*, *supra*, at 67, there is no need for it also to be psychologically injurious.
>
> "This is not, and by its nature cannot be, a mathematically precise test. We need not answer today all the potential questions it raises, nor specifically address the EEOC's new regulations on this subject, see 58 Fed. Reg. 51266 (1993) (proposed 29 CFR §§ 1609.1, 1609.2); see also 29 CFR § 1604.11 (1993). But we can say that whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required."

62 U.S.L.W. at 4005. The Supreme Court rejected the standard of a serious affect on psychological well-being and reaffirmed the standard of the totality of the circumstances. The Supreme Court also rejected any requirement of both an affect on work performance and an affect on psychological well-being. Petitioner's case is a good example of the sexual harassment that can "detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."

Thus, the Seventh Circuit and the district court used the wrong legal standard, and the opinion must be reversed and remanded so that the district court can decide the facts based

on the totality of the circumstances legal standard and not the legal standard of "such anxiety and debilitation to the plaintiff that working conditions were 'poisoned,'" which the district court used earlier. A-36.

III. The Disparate Treatment Of A Female Employee Being Placed Behind A Blackboard During A Two Day Test By A Male Instructor As a "Childish" Response To Her Complaint Of Sex Harassment, Which Resulted In A Lower Test Score Than Her Previous Test Score, Can Qualify As Adverse Treatment.

The district court found that the placement of the barrier of the blackboard between the male instructor and the female employee could not qualify as adverse treatment because the female could walk around the barrier. The district court made the following conclusion of law:

> "27. The Court finds that the placement of the blackboard between the instructor and the plaintiff during the practical examination does not qualify as adverse treatment as the instructor continued to answer questions and work with the students whenever needed during their examination. It was plaintiff's decision not to seek the instructor's assistance."

A-40.

There is no requirement in the law for a plaintiff to prove that she can not go around, or over, or under a barrier. It is the erection of barriers in the face of minority workers that is prohibited. These barriers cause embarrassment, humiliation, and discouragement in minority workers in addition to the physical obstacles which are placed in their way. As *Harris* stated, they "detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." 62 U.S.L.W. at 4005. Title VII was intended to remove barriers to minority workers and to remove "built-in headwinds" in testing. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

The court of appeals stated as follows:

> "Although Cafrelli's deployment of the blackboard in some peoples' minds may have been considered 'childish,' (as the trial court found), placing the blackboard between himself and Rennie enabled Cafrelli to remain in the room during the test yet separated from Rennie to avoid any suggestion much less accusation that he was staring at her. While we recognize that the placement of the blackboard might be classified as different treatment, albeit a slight difference, we hold that it did not rise to the level of adverse treatment because the instructor still made himself available to answer questions and the placement of the blackboard was an attempt to respond to the plaintiff's concern that Cafrelli was staring."

A-15. Thus, the court of appeals acknowledged that the female who complained received different treatment because she complained. Again, the only reason plaintiff did not prevail was because the court of appeals stated that it was not serious enough. Such holding is contrary to the legal standard in *Harris*, which rejected the Sixth and Seventh Circuits' requirement of an effect on the psychological well-being. Different adverse treatment is unlawful.

The Supreme Court in *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988) found a similar screen in a criminal trial to interfere with the communication of the person behind the screen, even though the attorney could walk around the screen to ask questions. The screen in that case was well-intended, but the Court reversed the criminal conviction in that case because of the interference of the screen. The blackboard in Petitioner's case was placed there as a childish response to her complaint of sex harassment.

The Petitioner in this case was not only put behind a blackboard for two days, the instructor told the male student not to answer Petitioner's questions because she might complain about him, which she had not done. After these events, the instructor saw Petitioner's hands shaking during the second test behind the blackboard (A-7), even though she soldered well

at the beginning of the class. Petitioner's score by Quality Audits on her second test was lower than her score by Quality Audits on her first test, even though it was the very same skill test. The head of Quality Audits testified that a lower score the second time on the same test was not normal. Tr. IV-624.

The court of appeals opinion also states that plaintiff conceded in her deposition that the blackboard as a partition was a good idea. Plaintiff stated that the part about him not staring at her was good, that he did not have to sit behind a blackboard to stop staring at her, and that he could have taught her. I-87-88. At no time did she testify that the "childish" response of the instructor pulling the blackboard in front of her was good, or that the instructor telling the male not to answer her questions was good, or that the instructor causing her hands to shake was good.

Retaliatory harassment is illegal unless the retaliatory harassment is so trivial that a person of ordinary firmness would not be deterred from speaking out. *Pieczynsky v. Duffy*, 875 F.2d 1331, 1333 (7th Cir. 1989). If persons knew that if they complained about sex harassment, they could be put behind a blackboard during a two day test as a childish response by the instructor to their complaint, and that the instructor could prohibit a fellow student from answering the person's questions, persons or ordinary firmness would be deterred from complaining about sex harassment for fear of failing the test and losing their jobs. The defendant's branch manager testified that the situation of having the instructor who intimidated plaintiff stay in the room "would have created the same problem." Tr. 126-127.

The district court and the court of appeals did not apply the proper legal standard to the facts in Petitioner's case They just stated that the female could have walked around the barrier placed in front of her by the instructor. If employers can rely on the *Rennie* decision of the court of appeals and place barriers in front of females who complain about sex harassment, then any complaints of sex harassment will be greatly deterred.

IV. Sanctions Can Not Be Imposed When No Prior Motion, Notice, Or Opportunity To Respond Was Given Before The Decision Was Made To Impose Sanctions.

The opinion dated August 27, 1993 concluded that the appeal was frivolous as follows:

> "Accordingly, we believe Rennie's appeal was frivolous as all she did was restate and reargue facts and credibility issues previously ruled upon in the district court."

A-18-19.

The opinion decided that sanctions are appropriate:

> "We are of the opinion that sanctions are appropriate under Rule 38 in this case for the very same reasons we stated in, *District No. 8, Int'l Assoc. of Machinists & Aerospace Workers, AFL-CIO*, 807 F.2d 618, 623 (7th Cir. 1986), (quotation omitted) . . . ."

A-19.

The opinion directed that appellant's counsel pay the defendant's costs and reasonable attorney fees as follows:

> "Because the plaintiff was most likely without knowledge of the legal standard of review she faced on appeal, we direct that her appellate counsel, who should have known the appropriate legal standards, pay the appellee-defendant's costs and reasonable attorneys' fees stemming from this appeal."

A-19.

After stating that the court had already decided that "sanctions are appropriate under Rule 38 in this case," and stated "we direct that her appellate counsel, . . . pay the appellee-defendant's costs and reasonable attorneys' fees stemming from this appeal," the court stated that Circuit Rule 38 requires reasonable notice. The opinion stated as follows:

> "Pursuant to Circuit Rule 38, we must provide reasonable notice to counsel that we are contemplating sanctions and give an opportunity to respond. Counsel for Rennie shall

submit its response to the sanctions to the clerk of this Court within fifteen days of the date of this opinion."

A-19. Although the opinion recognized that the circuit rule requires reasonable notice, the opinion did not provide reasonable notice. Reasonable notice must be given before the court decides that "sanctions are appropriate" and before it "directs" counsel to pay sanctions. Otherwise, counsel would have an insurmountable burden of attempting to change the decision of the court of appeals in the court of appeals.

The decision had not only been made by the court of appeals, it had been announced in a published opinion. Nothing that appellant's counsel could have said would have changed the mind of the panel. Panels *almost never* change their minds after announcing their decisions. This is especially true when the decision is announced to the public in a published opinion. Thus, Appellant's counsel was given an insurmountable burden. The burden is not supposed to be on the sanctioned party in the first place. The burden is supposed to be on the moving party, which in this case was the court.

After the August 27, 1993 opinion, the court issued a *pro forma* order in two paragraphs which established the amount of the fees and costs in this case and gave no regard to the arguments in the "Response To Sanctions" other than the formal recital that the response was considered. A-21-22. The Order dated October 14, 1993 began by stating that the opinion of August 27, 1993 "stated that Plaintiff-Appellant's appeal was frivolous and that the court was contemplating sanctions." However, contrary to the statement in the Order, the opinion of August 27, 1993 did not state that the panel was "contemplating sanctions." Instead, the panel opinion stated "(w)e are of the opinion that sanctions are appropriate under Rule 38 in this case for the very same reasons we stated in *District No. 8, Int'l Assoc. of Machinists & Aerospace Workers, AFL-CIO*, 807 F.2d 618 (7th Cir. 1986) . . . ." The panel opinion also stated "we direct that her appellate counsel, who should have known the appropriate legal standards, pay the appellee-defendant's costs

and reasonable attorneys' fees stemming from this appeal."

The only reference to "contemplating sanctions" in the August 27 opinion was the reference to the rule. Nowhere in the opinion did it state that the panel was contemplating sanctions. To the contrary, the court stated that it had already decided that "sanctions are appropriate" and "we direct that her appellate counsel" pay costs and attorney fees. A-19.

After the final order was issued imposing the amounts of attorney fees and costs on the appellant's attorney, the court of appeals did not allow the appellant's attorney to request reconsideration by the panel or by the full court of appeals. No initial notice or opportunity to respond was given before the decision was made to impose sanctions, and no opportunity to request reconsideration was given. Counsel was given only an opportunity to file a "response to sanctions."

Sanctions in litigation are intended to be rendered only in extraordinary cases. In the extraordinary case where sanctions are rendered, a party must first give notice to the other party of a request for sanctions, the reasons for the notice, and an opportunity to respond to the notice. Sanctions may be rendered by the court on its own motion, but if no party has requested sanctions, the court must be careful in doing so. When the court inserts itself into the dispute and as a moving party, without any request from any party to the litigation, decides to raise the issue of whether sanctions are appropriate, there is an even greater need to give notice to the parties that the court has raised the issue on its own motion and to give the parties an opportunity to respond to the issue before the court makes a decision on the issue.

In the case of *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980) the Supreme Court noted as follows:

> "Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record."

447 U.S. at 767. The decisions of the courts of appeals are not in

harmony as to what is fair notice and an opportunity to be heard. Petitioner's attorney in this case is not requesting an in-person hearing, but rather, an opportunity to respond on paper before the court decides whether "sanctions are appropriate." In some cases the courts of appeals have approved of courts deciding on sanctions and giving notice later, in sort of "Alice In Wonderland" style, as in this case. See the various findings summarized in Joseph, *Sanctions, The Federal Law of Abuse*, § 17(D)(2) "Pre-Award vs. Post-Award Opportunity To Be Heard."

The Seventh Circuit recognized in *Textor v. Board of Regents of N. Ill. Univ.*, 711 F.2d 1387 (7th Cir. 1983) that notice of contemplated sanctions must be given before the decision is made to impose sanctions. The court noted that making a decision before notice has been given improperly places the burden on counsel to attempt to change the mind of the court. The decision held that notice and opportunity given after the decision is made is unreasonable and misapplies the burden of proof.

The Seventh Circuit later held that sanctions may be imposed on an attorney if the court allows the attorney to respond to the sanctions and entertains a reconsideration motion accompanied by full briefing on both sides. *Brown v. National Bd. of Medical Examiners*, 800 F.2d 168, 173 (7th Cir. 1986). Accord, *Muigai v. I.N.S.*, 682 F.2d 334, 337 (2d Cir. 1982); *Searcy v. Houston Lighting & Power Co.*, 907 F.2d 562, 566 (5th Cir. 1990).

The Ninth Circuit followed the earlier Seventh Circuit *Textor* reasoning and held that notice given after the decision had the effect of erroneously placing the burden on the sanctioned party. *Tom Growney Equip. v. Shelley Irr. Development*, 834 F.2d 833 (9th Cir. 1987).

The Seventh Circuit amended its Circuit Rule 38 to require reasonable notice and an opportunity to respond before imposing sanctions. However, what is reasonable notice and opportunity to respond has been the subject of different opinions.

See, *Osuch v. I.N.S.*, 970 F.2d 394 (7th Cir. 1992); *International Union Of Operating Engineers Local No. 150 v. Centor Contractors, Inc.*, 831 F.2d 1309, 1314, n. 6 (7th Cir. 1987); *Shrock v. Altru Nurses Registry*, 810 F.2d 658 (7th Cir. 1987).

The decision below in *Rennie* evidences the violations of reasonable notice and opportunity to respond which occur under such rule. It has been proposed that Rule 38 of the Federal Rules of Appellate Procedure be amended to incorporate the same procedure of prior notice used in Seventh Circuit Rule 38. Thus, the Seventh Circuit procedures in the *Rennie* decision are of national importance. The Seventh Circuit has become a leader in sanctions in the courts of appeals. Whether the Supreme Court grants certiorari to review those procedures or denies certiorari will be relied upon by courts across the country. Certiorari should be granted in order to correct the procedures. The *Rennie* decision using a "response to sanctions" procedure should not be cited as "*cert. denied*," and used by other courts. The Court's statement in *Roadway Express* as to what is "fair notice and an opportunity for a hearing on the record" needs clarification as to the proper procedure for all courts to follow in considering sanctions.

Even before the *Rennie* decision, a leading commentator on sanctions identified as a problem the procedures used in imposing sanctions in the courts of appeals.

> "It is regrettable that the courts of appeals do not lay greater emphasis on affording counsel and litigants due process rights when they, as opposed to the district courts, are imposing sanctions. Notice and opportunity to be heard are the fundamental components of due process. Whether or not a formal hearing is provided — and, if so, whether that ought to be held in the court of appeals or the district court — the mere rendition of a sanction with an opportunity to petition for rehearing should not be the normal course in which sanctions are imposed. The court should hear from counsel or the litigant before it makes up its mind and then requires the person it has already determined to be an offender to attempt to convince it to the contrary. *See generally* § 17(D) *supra*."

Joseph, *Sanctions, The Federal Law of Litigation Abuse* (1989) § 33(A) p. 429. Under the *Rennie* procedure, the appellant and her attorney are not even given the opportunity to petition for rehearing after the final order on sanctions.

V. Sanctions Can Not be Imposed On The Basis That Only Credibility Issues Were Raised, When In Fact No Credibility Issue Was Raised, And Sanctions Can Not Be Imposed On Hostile Environment Issues When The Supreme Court Was Considering Those Issues.

Appellant's counsel did not commit the act alleged in the opinion. The opinion stated that the appeal was frivolous for the reason that "all the appellant did was restate and reargue facts and credibility issues." A-18. The appellant is *not* guilty of that statement, because all the appellant did was not to restate and reargue facts and credibility issues. None of the issues raised by the appellant were credibility issues.

The opinion quoted the standard for review of credibility issues, and implied that appellant's counsel ignored that standard. A-18-19. The issues raised by the appellant in the Brief of Appellant with the appropriate page numbers were as follows:

1. The district court erred in ignoring all facts in its conclusion of law on sex harassment other than one joke 30
2. The district court erred when it made the conclusion of law that the placement of the blackboard between the instructor and the plaintiff during the practical examination does not qualify as adverse treatment for retaliation 35
3. The district court erred in holding that the employer could terminate plaintiff for a reason which was related to the protected activity 41
4. The district court erred in holding that the employer could refuse to rehire plaintiff for a reason which was related to the protected activity . 44

5. The district court erred as a matter of law in making no finding or conclusion as to why plaintiff was not treated in the same manner as the male with dyslexia and the female who had not complained about sex harassment 44

6. The district court erred in its conclusion of law which held that there was no causal link between NAC's failure to rehire plaintiff immediately following the voicing of her complaint 46

7. The district court erred in denying the request for the discovery of the Navy reports on the toleration of sex harassment by the Navy as a general practice 47

Br. Appellant, p. i. The same issues were stated in the Reply Brief at page i. None of the issues were issues of credibility.

The court of appeals stated that the appellant "could not possibly have maintained any reasonable belief that we would reverse the court's findings (of fact) on appeal." A-18. The appellant did not raise any issue of a challenge to a finding of fact. The issues raised were issues of law relating to conclusions of law.

The appellant Rennie was entitled to argue that the trial court in her case should use the legal standard of the totality of the circumstances in determining a hostile work environment, instead of just one fact. Appellant's counsel was sanctioned for arguing for the totality of the circumstances test that the Supreme Court affirmed in *Harris*.

Furthermore, the Seventh Circuit had previously held that the existence of a hostile work environment is a question of law to be reviewed *de novo* once a court makes its finding of facts based upon evidence of record. *Brooms v. Regal Tube Co.*, 881 F.2d 412, 420 (7th Cir. 1989). Thus, the issue raised by the appellant as to whether the undisputed facts and facts found by the district court constituted a hostile work environment was a question of law to be decided *de novo* by the court of appeals.

Counsel can not be sanctioned for following the rule of the court of appeals.

The opinion of the court of appeals found "harassment based on sex" (A-11), but denied relief to plaintiff because she failed to establish an environment that affected seriously her psychological well-being. At the time of the opinion, the Supreme Court was reviewing the degree of offensiveness necessary to constitute harassment. *Harris v. Forklift Systems, Inc.*, 976 F.2d 733 (6th Cir. 1992), *cert. granted* 113 S.Ct. 1382 (1993). Counsel can not be sanctioned for arguing what is being considered in the Supreme Court. Furthermore, the employee in the *Harris* case was successful, and the standard used in the Sixth Circuit and Seventh Circuit was reversed. Thus, the case law cited by the court of appeals was reversed as to the standard for judging hostile work environment shortly after the attorney was sanctioned by the court of appeals for arguing a hostile work environment.

None of the other issues attempted "to reverse the trial judge's findings of fact which were based on the credibility of several witnesses." Each of the issues raised an issue of law, not an issue of fact. The credibility of witnesses was not raised as an issue by appellant's counsel. Thus, there is no evidence that "all she did was restate and reargue facts and credibility issues previously ruled upon in the district court." A-18-19.

The stigma of sanctions is substantial, and the sanctions in this case discourage counsel from raising proper issues for appeal. Joseph, *Sanctions*, *supra*, § 33(B). The sanctions imposed in this case without motion, without notice, without opportunity to respond before the decision that sanctions are appropriate, and without basis must be reversed.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted. In the alternative, the judgment should be vacated in summary disposition and the case remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Harris v. Forklift Systems, Inc.*, ___ U.S. ___ (1993).

Respectfully submitted,

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Appendix

APPENDIX

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In the
United States Court of Appeals
For the Seventh Circuit

No. 92-2644

MARY ANN CARTER RENNIE,

Plaintiff-Appellant,

v.

JOHN DALTON, Secretary of the Navy,*

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
Nos. 86 C 1082 & 88 C 652—**William E. Steckler**, *Judge.*

ARGUED JANUARY 27, 1993—DECIDED AUGUST 27, 1993

Before COFFEY and EASTERBROOK, *Circuit Judges*, and WOOD, *Senior Circuit Judge.*

COFFEY, *Circuit Judge.* In 1982, after being dismissed from the Naval Avionics Center ("NAC"), Mary Ann Carter Rennie filed a complaint with the Equal Employment Opportunity Office ("EEO") at NAC alleging sexual harassment during the course of her employment. Several

* This action was commenced in 1986 against the Secretary of the Navy, James H. Webb, Jr. Since that time, several different individuals have served as Secretary. Pursuant to Fed. R. App. P. 43(c)(1), a public officer who replaces his or her predecessor will automatically be substituted without prejudice to either party.

years later, after an EEO investigation, the Equal Employment Opportunities Commission ruled that no sexual harassment occurred. Thereafter, in 1986, Rennie filed this suit against the Navy for sexual discrimination and unlawful retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (1988). After a bench trial in which both parties called numerous witnesses to testify, the district court issued an opinion listing 117 separate factual findings and held that the Navy had not discriminated against Rennie on the basis of sex nor retaliated against her for making an EEO complaint. Rennie appeals. We affirm.

I. *BACKGROUND*

A. *Factual History*[1]

At the time of the alleged incident at the Naval Avionics Center ("NAC"), Mary Ann Carter was a twenty-five year-old single female living with her parents and one child. She was a high school graduate with previous employment experience at Ford Motor Company, Research Engineering, and Contact Metal Welding as an assembler of parts. NAC is a civilian facility operated by the Navy in Indianapolis, Indiana, that manufactures customized electronic components for the Navy including classified military and navigational equipment. Due to the sensitive military equipment NAC manufactures, soldering is one of the most essential skills required in NAC's manufacturing process and thus its soldering standards are considerably higher than in commercial settings.

In March 1982, Mary Ann was hired for a temporary position at NAC as an electronics mechanics helper ("EMH") contingent upon her passing a government soldering course. Prior to the time she commenced employment with NAC, she had had no previous soldering experience. She alleges

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[1] Our version of the facts relies primarily on the trial court's findings.

that NAC failed to inform her that she would have to do soldering work until after she was hired. Since 1962, NAC has required everyone who does soldering to take a soldering course and pass a two-part exam consisting of written and practical components designed to test their soldering skills.

The course curriculum and requirements of the test were set forth in the Quality Workmanship Standard, which also set forth NAC's soldering quality standards. The soldering course included several days of instruction after which the students underwent both a written exam (graded by the instructor) and a practical exam which involved applying various soldering techniques on a chassis. The instructor graded the practical exam and forwarded it to Quality Audits which gave the final binding grade on the practical exam.[2]

At the time of the alleged incident the full-time soldering instructor at NAC had retired and Joseph Cafrelli had been transferred from an NAC soldering unit and employed as a part-time instructor. Before taking over the soldering course, Cafrelli received two weeks of instructor training from the NAC Quality Audits Department. It should be pointed out that Cafrelli has never been the subject of a sexual harassment complaint before now.

On April 8, 1982, the plaintiff and three other students commenced an NAC soldering course that was completed on April 16, 1982. The classroom was very "cramped and small" and it was most difficult for more than one person to move around at the same time. The students were under more than the normal classroom pressure for if they failed the course they would lose their temporary employment. The record reflects that to the best of his ability, Cafrelli tried to ease the tension by permitting the class

[2] Quality Audits maintained a "blind grading system" in which each practical test was only identified by a tag bearing the student's confidential number.

members to engage in casual conversation. On the first day of class his communication took the form of what might be classified as an ill-advised off-color joke. Cafrelli admitted to telling the joke and was later rebuked by one of the students, Lamona Leal, for his actions. Later, he apologized to Leal and the class for his exercise of poor judgment and bad taste. Cafrelli also participated in a discussion in the class regarding a strip bar known as the "Harem House." Rennie claims that Cafrelli said he had gone to the Harem House, "paid five dollars and didn't even get a feel," and he asked her if she had ever been to Scarlet's Strip Bar. The court found that neither the off-colored joke nor the discussion regarding the strip bar were directed towards Rennie nor did she ever mention much less complain to Cafrelli about these comments.

Rennie alleged that Cafrelli touched her and stared at her for long periods of time which in turn made her quite nervous. Surprisingly, none of the other students testified that they observed any type of staring or physical contact, let alone any offensive touching between the two. On the other hand, the students testified that Cafrelli was a good instructor and they observed special efforts on Cafrelli's part to help Rennie because she was the only one in the class experiencing difficulty with the soldering program due to her lack of manual dexterity. The district court found that because of the limited area in the classroom (20 feet by 40 feet including many cabinets and work benches), the other students would obviously have been aware of any harassing contacts. The trial court attributed Cafrelli's attention to Rennie as nothing but the usual observation an instructor pays to a student having difficulty in a classroom environment.

During the first soldering course, Rennie became defensive as well as argumentative when Cafrelli critiqued her work product. At this juncture, Cafrelli requested the assistance and advice of his immediate supervisor, Aubrey Ward, as well as his and Rennie's supervisor, Everett Rance, on how to deal with Rennie in class. Rance advised him to be careful not to aggravate the situation.

At one point, Cafrelli asked Rennie if she appreciated how he was trying to help her. Thereafter, Rennie complained to two students, Lamona Leal and Robbie Sharp, that the instructor was making her nervous. Rennie implied to Sharp (whom she dated) that Cafrelli was sexually harassing her but Sharp never observed any harassment.

At the end of the course, the students took the two-part examination. Cafrelli graded the written exams and gave Rennie a passing score of seventy-six. In addition, he scored the other students practical exams (except for Rennie's) and forwarded them to Quality Audits which also graded them. In order to avoid questions of personal bias, Cafrelli felt that it was best that he did not grade Rennie's practical test; consequently, he sent Rennie's practical test directly to Quality Audits for an anonymous grading without evaluating it himself. Larry Songer graded Rennie's test for Quality Audits (not knowing it was Rennie's because of the blind grading system) and gave her a failing grade of thirty-eight (a passing score of seventy was required). Songer characterized Rennie's work as "grossly unsatisfactory." He then forwarded Rennie's practical test to Charles Rueter, Chief of Quality Audits and one of only three "grade A" senior examiners in the military. Rueter confirmed the score and later met with Rennie to discuss her performance and how she could improve. Rennie never mentioned anything about Cafrelli during this conversation.

After learning that Rennie had failed the class, Everett Rance, her supervisor, arranged for her to repeat the course. Rennie and one other student who had also failed a prior course began a second course with Cafrelli as the instructor on April 26, 1982. Initially, Rennie's performance in the repeat course demonstrated marked improvement but shortly thereafter, her soldering work began to deteriorate. When Cafrelli tried to instruct her she again responded defensively. In response to a critique of her work, Rennie told Cafrelli that she was considering filing an EEO complaint which Cafrelli perceived as a threat. On April 27, 1982, Cafrelli went to his supervisor (Everett

Rance) to discuss this attempted intimidation. Rance asked Fred Seddon, Rennie's immediate supervisor to meet with her in hopes of identifying and solving the problem. Rennie told Seddon that although she previously had a small problem, it had been taken care of and that now "everything was okay." Rance also suggested to the instructor that he keep his distance from Rennie and that he be careful not to exacerbate the situation. The next day Cafrelli cautioned Rennie about the quality of her work, at which time she responded that if she failed the class she would go to the EEO office at NAC. That same day, Rennie carried out her threat and went to the EEO office and complained to Jackie Miller that Cafrelli was staring at her and "giving her the eye."

Subsequently, Rance spoke with Cafrelli and suggested that because Rennie felt intimidated by him, it would be advisable for him to remain as "separate" or "absent" from Rennie as possible during the practical test in order to avoid further accusations and/or problems. Cafrelli stayed in the room during the test in order to monitor the students and answer questions but he placed a movable blackboard between himself and Rennie to prevent any further accusations of staring.[3] Despite the placement of the blackboard, Jesse Crosby, the other student, tes-

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[3] The record is unclear as to whose idea it was for Cafrelli to sit behind the blackboard. Cafrelli testified at trial that "I believe it was Aubrey Ward said [']what can we do about this,[']and somehow the suggestion came up about sitting behind the blackboard . . . ." Cafrelli testified on cross-examination, "Someone else suggested that a good way to separate myself from Mary in the classroom was to sit behind the chalkboard." When asked who suggested it, Cafrelli testified "I don't remember. It would have been probably Aubrey Ward. . . ." Despite this testimony, the trial court's findings of fact failed to attribute responsibility for the blackboard idea to Aubrey Ward. The court found "the instructor placed a blackboard between himself and plaintiff because it would mean the plaintiff would be unable to accuse the instructor of staring at her." *Rennie v. Garrett*, No. IP 88-0652-C (S.D. Ind. June 11, 1992) at 8.

tified that Cafrelli continued to answer questions and assist both students during the test. Rennie testified that after Cafrelli placed the blackboard between them he appeared to be angry and acted "smart-alecky" towards her. Crosby disagreed and stated that he never witnessed the conduct Rennie described and certainly was in a position to observe it had it occurred. During the exam, Rennie sought assistance from Crosby, but Cafrelli prohibited this claiming that if she were to fail it could be because of Crosby's incorrect advice. The instructor testified that he observed Rennie's hands were shaking during the exam. Afterwards, he graded Rennie's second practical test and gave it a failing grade of forty-five. The test was then forwarded to Quality Audits where it was graded by Larry Songer (using the blind grading system) who gave it a score of twenty-six. The grade was confirmed by Charles Rueter, the Chief of Quality Audits.

NAC terminated Rennie after she failed the second soldering course because NAC had a personnel management policy in 1982 of not transferring temporary employees to a position other than that for which they were originally hired. Rennie was hired as an electronics mechanics helper ("EMH") in Branch 235. All but one section in Branch 235, encapsulation, required completion of the soldering course. Because there were no EMH positions available in the encapsulation unit at the time, Rennie was discharged. Rennie reapplied to NAC on February 3, 1983. This timely reapplication served to keep her on the eligible list for an EMH job for six more months. After this period, she failed to take the necessary steps to keep herself on NAC's eligible list of hirees.

B. *Procedural History*

Rennie's final day of work was May 8, 1982. Just ten days later, on May 18, 1982, Rennie filed a written complaint with the EEO Office at NAC. On June 9, 1982, the NAC requested the appointment of an EEO investigator by the Naval Civilian Personnel Command, Northern Field Division, Philadelphia, Pennsylvania. An investigator was

appointed on July 12, 1982. On November 18, 1982, the EEO Office at NAC issued an investigator's report finding that Rennie was not sexually harassed, nor sexually discriminated against, nor discharged in retaliation for complaining of the alleged Title VII violations. Rennie sought review of the investigator's report from a Complaints Examiner at the Equal Employment Opportunity Commission ("EEOC"). The EEOC held a hearing on May 20, 1983 and on December 29, 1983, issued a proposed ruling, finding that Cafrelli's off-color joke in class constituted sexual harassment but that no sexual advances were made. However, the Complaints Examiner failed to find any evidence to support a claim of sex discrimination or a claim of retaliatory discharge. On May 17, 1984, the Navy refused to adopt the report of the Complaints Examiner because the Secretary believed that a single off-color joke did not qualify as a hostile environment or sexual harassment. Rennie appealed the Navy's ruling to the EEOC which, on June 25, 1986, affirmed the Navy's decision.

In 1986, Rennie filed this lawsuit in the district court alleging sexual discrimination and unlawful retaliation. The Navy moved to dismiss because the plaintiff never asserted retaliation in her EEO claim. Shortly thereafter, she filed a second lawsuit this time alleging that the NAC's refusal to rehire her was in retaliation for her filing an EEO complaint. The trial court dismissed both complaints on the grounds that Rennie had not exhausted her administrative remedies because she had failed to file an EEO complaint alleging retaliation. On appeal, this court remanded the action to the district judge, holding that the plaintiff need not file a second EEO complaint to satisfy the exhaustion of remedies doctrine. *Rennie v. Garrett*, 896 F.2d 1057 (7th Cir. 1990). On remand, the parties agreed before trial to treat the second complaint as an amendment of the first and address all allegations therein.

II. *ISSUES*

On appeal, Rennie claims that the trial court erred in finding: (1) that she was not sexually harassed; (2) that she was not subjected to retaliatory treatment during the second soldering class; (3) that the NAC's failure to transfer or rehire her was not in retaliation for her making an EEO complaint; and (4) that the district court abused its discretion when it denied her motion to compel the production of Navy documents under Fed. R. Civ. P. 34.

III. *DISCUSSION*

A. *Standard of Review*

Rule 52(a) of the Federal Rules of Civil Procedure requires that we review the trial court's finding of facts under a clearly erroneous standard. The trial judge has the best "opportunity to observe the verbal and non-verbal behavior of the witnesses focusing on the subject's reactions and responses to the interrogatories, their facial expressions, attitudes, tone of voice, eye contact, [displays of nervousness,] posture and body movement . . . ." *Churchill v. Waters*, 977 F.2d 1114, 1124 (7th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3851 (1993). If there are two permissible views on the evidence, the district court's choice between them cannot be clearly erroneous. *Swanson v. Elmhurst Chrysler Plymouth, Inc.*, 882 F.2d 1235, 1237 (7th Cir. 1989), *cert. denied*, 493 U.S. 1036 (1990). Review on issues of law is *de novo*, *Mozee v. American Commercial Marine Service Co.*, 940 F.2d 1036, 1044 (7th Cir. 1991), *cert. denied*, 113 S. Ct. 207 (1992), but "[i]f the trial judge correctly states the law, then his findings as to whether the facts meet the legal standard will be disturbed only if they are clearly erroneous." *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1269 (7th Cir. 1991).

B. *Hostile Environment Sexual Harassment*

Rennie alleges that Cafrelli's actions created a hostile work environment which she argued rose to the level of

sexual harassment. A mere allegation is insufficient, however, to render the defendant liable. The Supreme Court, in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), held that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." *Id.* at 66. The Court went on to state that "for sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' " *Id.* at 67 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)).[4] *Meritor* concluded that "The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome' . . . [T]he question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact . . . ." *Id.* at 68. We have held that "only if the court concludes that the conduct would adversely

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[4] The Equal Employment Opportunity Commission (EEOC) issued Guidelines explaining that "sexual harassment" is a type of sex discrimination prohibited under Title VII. The Guidelines state, in part:

> "(a) Harassment on the basis of sex is a violation of section 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

29 C.F.R. § 1604.11(a). The Supreme Court has noted that "these Guidelines, while not controlling upon the courts by reason of their authority, do constitute of body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor*, 477 U.S. at 65 (quoting *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-142 (1976)).

affect the work performance and the well-being of both a reasonable person and the particular plaintiff bringing the action may it find that the defendant has violated the plaintiff's rights under Title VII." *Brooms v. Regal Tube Co.*, 881 F.2d 412, 419 (7th Cir. 1989); *Swanson*, 882 F.2d at 1238. Thus there is both a subjective and objective component of a harassment claim. The plaintiff must establish that *she* was adversely affected by the conduct and that a *reasonable* person would also have been adversely affected. *Id.* Moreover, "[i]solated and/or trivial remarks of a sexual nature" do not satisfy the definition of sexual harassment: "the offensive conduct must be persistent." *Downes v. FAA*, 775 F.2d 288, 293 (Fed. Cir. 1985). In *Swanson*, this court set forth a five-part test for a plaintiff to maintain a Title VII claim based on hostile work environment sexual harassment.

> "(1) The employee was a member of a protected class; (2) the employee was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature; (3) the harassment complained of was based upon sex; (4) the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance in creating an intimidating, hostile, or offensive working environment that affected seriously the psychological well-being of the plaintiff; and (5) the existence of respondeat superior liability."

Swanson, 882 F.2d at 1238.

While Rennie satisfied a few of the elements of her prima facie case ((1) she is a member of a protected class, (3) the harassment was based on sex, and (5) respondeat superior liability exists), she fell short of satisfying all of the required elements. The plaintiff failed to present any evidence of sexual advances much less any proof of requests for sexual favors. She instead bases her argument on one off-color joke and a conversation about a strip bar, but the district court found she failed to establish that

either communication was directed at her personally. She also alleges that Cafrelli stared at her and touched her, however, the trial court found this to be untrue for if any staring or touching had occurred in the limited quarters of the classroom, the other students would have observed it. The record supports this finding.

The plaintiff has also failed to establish that the alleged sexual harassment "had the effect of unreasonably interfering with [her] work performance in creating an intimidating, hostile, or offensive working environment that affected seriously [her] psychological well-being." *Id.*[5] We are in agreement with the finding that Cafrelli's alleged conduct did not interfere with the plaintiff's work performance, for the record before us falls far short of demonstrating "demeaning conduct and sexual stereotyping [resulting in] anxiety and debilitation to the plaintiff [such] that working conditions were 'poisoned' within the meaning of Title VII." *Brooms*, 881 F.2d at 418 (quoting *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 213 (7th Cir. 1986)). Likewise, Rennie has failed to demonstrate that Cafrelli's conduct would have adversely affected the work performance of a reasonable person. *Brooms*, 881 F.2d at 419. Since the court failed to find that sexual harassment occurred, a reasonable person certainly would not have been affected by Cafrelli's actions. *See Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1274 (7th Cir. 1991). Rather

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[5] The Supreme Court has granted a petition for certiorari in a Sixth Circuit case in which the court dismissed a plaintiff's sexual harassment claim because the alleged conduct did not "seriously affect [her] psychological well-being." *Harris v. Forklift Systems, Inc.*, 1990 U.S. Dist LEXIS 20115 at *18 (Nov. 28, 1990), *aff'd*, 976 F.2d 733 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 1382 (1993). While we have mentioned this element (affect on psychological well-being), our holding does not depend on it for not only did Rennie fail to present any evidence that the alleged conduct had a serious affect on her psychological well-being, but she also failed to establish that she "was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature . . . ." *Swanson*, 882 F.2d at 1238.

than attributing Rennie's poor performance to the alleged harassment, the trial court found that Rennie lacked the manual dexterity to meet the NAC soldering standards. We are in agreement with this finding and add further that it is common knowledge that some individuals get very nervous during testing procedures especially when they are unprepared or lack the requisite skills. We are of the opinion that the alleged conduct was insufficient as a matter of law to support a harassment claim because an isolated joke and conversation about a strip bar, even though we might consider offensive and in very poor taste, were not "persistent" nor did they "poison" the work environment. Based upon our review of the record, we hold that the district court finding was not clearly erroneous and that the isolated incidents fall short of the requisite level of hostility or pervasiveness needed to establish a hostile work environment violation under Title VII.

Finally, we are perplexed by the plaintiff's allegation that the trial court considered only "one dirty joke" to the neglect of the other alleged harassing acts. The court's conclusions of law regarding hostile environment sexual harassment clearly discuss both the joke and the conversation relating to the strip bar, *see Rennie v. Garrett*, No. IP 88-0652-C (S.D. Ind. June 11, 1992) at 18 (Conclusion of Law No. 9), thus, we conclude that Rennie's argument that the trial court failed to consider all the evidence in ruling on sexual harassment is without merit.[6]

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[6] At oral argument, counsel for the plaintiff repeatedly stated that the district court made findings regarding "quid pro quo" sexual harassment, yet counsel maintained that the plaintiff never alleged "quid pro quo" at trial. Despite counsel's assertion, the plaintiff, in her brief and trial testimony stated that she "believed that the temporary instructor wanted a sexual favor," Appellants Brief at 12, which sounds a lot like "quid pro quo." At trial, the court was unable to understand what theories the plaintiff was relying on because of the plaintiff's contradictory assertions and pleadings. The trial court's findings regarding "quid pro quo" obviously represent its attempt to address all possible theories based on the evidence submitted. However, because the plaintiff has disavowed any "quid pro quo" claim on appeal, we fail to see a need to address it.

C. *Retaliatory Harassment*

Rennie asserts that she was subjected to retaliatory harassment when: (1) Cafrelli placed the blackboard between them during the second soldering test, (2) she was discharged without being transferred to another position, and (3) the NAC failed to rehire her in 1983. She believes that NAC's actions were in response to her talking to the EEO counselor about the alleged sexual harassment and ultimately filing an EEO complaint.

The district court observed that in order for Rennie to prevail in her Title VII case of retaliation she had to satisfy the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).[7] *McDonnell Douglas* held that the plaintiff must initially establish a prima facie case of discrimination. The burden then shifts to the employer who must articulate a legitimate and non-discriminatory reason for its actions. If the employer succeeds, the plaintiff may still prevail by demonstrating that the employer's stated reasons for the challenged action are merely pretextual and the employer's actual reason was discriminatory. *See id.* at 802-04; *Holland v. Jefferson National Life Insurance Co.*, 883 F.2d 1307, 1313 (7th Cir. 1989). A prima facie case of retaliation exists when the plaintiff establishes that "(1) she engaged in statutorily protected expression; (2) she suffered an adverse action by her employer; and (3) there is a causal link between

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[7] In *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993), the Supreme Court clarified the *McDonnell Douglas* shifting burdens framework. In *Hicks*, the plaintiff argued that if the trier of fact rejects the defendant's stated reasons for undertaking the challenged action, i.e. terminating the employee, the court is compelled to find for the plaintiff. The Supreme Court refused to adopt this position stating that "although the *McDonnell Douglas* presumption shifts the burden of *production* to the defendant, '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.' " *Hicks*, 113 S. Ct. at 2747 (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

the protected expression and the adverse action." *Holland*, 883 F.2d at 1313. We examine the plaintiff's allegations of retaliation in turn, reviewing the district court's findings under the clearly erroneous standard. *Pullman-Standard v. Swint*, 456 U.S. 273, 290 (1982).

Rennie's complaint to the EEO office during the second soldering course constituted statutorily protected expression. *See*, 42 U.S.C. § 2000e-3(a). She claims that Cafrelli's treatment of her during the second soldering class (placing the blackboard between them) was an "adverse action" and that the placement of the blackboard was directly linked to her EEO complaint. The trial court found that Cafrelli's placing the blackboard between himself and the plaintiff during the second exam did not constitute adverse treatment because Cafrelli continued to answer questions and work with the students. The court concluded that it was Rennie's own choice not to seek help from the instructor during the exam. Although Cafrelli's deployment of the blackboard in some peoples' minds may have been considered "childish," (as the trial court found), placing the blackboard between himself and Rennie enabled Cafrelli to remain in the room during the test yet separated from Rennie to avoid any suggestion much less accusation that he was staring at her. While we recognize that the placement of the blackboard might be classified as different treatment, albeit a slight difference, we hold that it did not rise to the level of adverse treatment because the instructor still made himself available to answer questions and the placement of the blackboard was an attempt to respond to the plaintiff's concern that Cafrelli was staring. We accept the trial judge's finding of facts on this point because it depends largely on the credibility of Cafrelli, Jesse Crosby (the other student) and the plaintiff. In fact, the plaintiff conceded in her deposition that using the blackboard as a partition was a "good idea." Accordingly, we affirm the district court judgment.

Rennie's second allegation of retaliation involved the Navy's refusal to transfer her to a different position after she failed to achieve a passing grade in her second solder-

ing course. She claims that her failure to pass the soldering exams was due to sexual harassment and therefore her failure cannot serve as a reason for discharge. *EEOC v. Board of Governors*, 957 F.2d 424, 427-428 (7th Cir.) (the reason for the discharge must be "unrelated to the employee's participation in a protected activity" such as filing an EEO complaint), *cert. denied*, 113 S. Ct. 299 (1992). Because we agree with the trial court's finding that Cafrelli did not sexually harass Rennie, her failure on the exams may serve as a legitimate reason for the discharge. The record supports the trial judge's finding that Rennie lacked the manual dexterity to meet NAC soldering standards. Thus the record is clear that Rennie was discharged because she was unqualified for the position and not because of retaliation. At the time of her discharge, NAC's regulations prohibited transferring any temporary employee from the position for which she was hired to any other position. Because all available EMH positions at the time of her discharge required soldering, NAC had no choice but to release her. We affirm the trial court's finding that Rennie was not qualified for soldering and that NAC's regulations prohibited transferring her to another position.

Finally, Rennie alleges that when she reapplied in February 1983, the NAC refused to rehire her because of her prior EEO complaint. We apply the same analysis employed in the preceding allegation. When Rennie reapplied in 1983, she sought the identical EMH position that she held prior to her discharge. Once again in 1983, the only EMH positions available required soldering skills, a task for which Rennie was unsuited. Therefore, NAC declined to rehire her. In fact, the trial judge found that the encapsulation section, the only unit without a soldering requirement, had not hired any new employees for the two years subsequent to Rennie's discharge in 1982. The record supports the district court finding that NAC's actions in refusing to rehire her were not retaliatory, but were prompted by Rennie's lack of qualifications for the EMH position. Not only has Rennie failed to establish a prima

facie case of retaliatory discharge, but she has also failed to rebut NAC's rationale for refusing to rehire her, i.e. no available positions. She has been unable to come forth with evidence of a single similarly situated applicant who was transferred or not rehired.[8] Thus, we are convinced that NAC's decision not to rehire Rennie was proper and without retaliatory motive.

D. *Denial of Rennie's Motion to Compel Production of Documents*

Rennie complains that the district court erred in denying her motion to compel Naval Department documents pursuant to Federal Rule of Civil Procedure 34. Trial courts have "broad discretion" over discovery matters. *Dole v. Local 1942 Int'l Bhd. of Elec. Workers, AFL-CIO*, 870 F.2d 368, 371 (7th Cir. 1989). We review a trial judge's pretrial discovery ruling under a clear abuse of discretion standard. *Id.* Apparently, Rennie had seen references to internal Naval Department documents relating to military women and she sought production of those documents to demonstrate a pattern of the Navy tolerating sexual harassment and discrimination. The district court denied the motion to compel disclosure because: (1) the documents dealt with duly enlisted female Navy personnel as contrasted with civilian employees, (2) they were not relevant, (3) the plaintiff could get the

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[8] Rennie pointed out that there were two other employees who had failed the soldering test but were not terminated. Amelia Sanders was a thirty-year *permanent* employee (in contrast to Rennie being a temporary employee) who failed the test four times, but had soldering removed from her duties shortly before she retired. The second, a man with dyslexia also failed the test but was placed in another non-soldering EMH position which was available at the particular time. As previously explained, however, there were no EMH positions available which did not require soldering at the time Rennie failed the second exam. In situations more analogous to the plaintiff's, the district court found that three other temporary employees had failed the exam twice and had been terminated.

documents from other sources, and (4) it was a burdensome request. While other allegedly discriminatory conduct by an employer can be relevant in a Title VII action, *Phillip v. ANR Freight Systems, Inc.*, 945 F.2d 1054 (8th Cir. 1991), *cert. denied*, 113 S. Ct. 81 (1992), the trial court found that Rennie failed to demonstrate any relation between the documents concerning enlisted personnel and her employment at NAC (a civilian branch of the Navy). In light of the extensive discovery and testimony the trial court permitted regarding all prior sexual harassment claims against NAC, we hold that it was not a clear abuse of discretion to deny Rennie's production requests. Clearly the court had the responsibility to draw the line as to what was and was not relevant to Rennie's claim. Her request exceeded the bounds of relevance because the documents involved enlisted personnel in an entirely different setting.

IV. *SANCTIONS FOR FILING FRIVOLOUS APPEAL*

While Rennie may have entertained some hope of prevailing before the trier of fact, once the district court ruled against her on all the important factual issues, she could not possibly have maintained any reasonable belief that we would reverse the court's findings on appeal. The only hope Rennie had of prevailing on appeal was for us to reverse the trial judge's findings of fact which were based on the credibility of several witnesses. "[W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each or whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985). In the case before us, not only was Rennie's testimony contradicted by all the other students in her soldering class but it was denied by Cafrelli as well. Accordingly, we believe Rennie's appeal was frivolous as all she did was restate and reargue facts and credibility issues

previously ruled upon in the district court. *See Spiegel v. Continental Illinois Nat'l Bank*, 790 F.2d 638, 650 (7th Cir.) ("[a]n appeal is frivolous where the result is obvious or when the appellant's argument is wholly without merit"), *cert. denied*, 107 S. Ct. 579 (1986); *see also Smith v. Blue Cross & Blue Shield*, 959 F.2d 655, 661 (7th Cir. 1992) ("[s]anctions are appropriate if the appeal was prosecuted with no reasonable expectation of altering the district court's judgment and for purposes of delay or harassment or sheer obstinacy").

We are of the opinion that sanctions are appropriate under Rule 38 in this case for the very same reasons we stated in *District No. 8, Int'l Assoc. of Machinists & Aerospace Workers, AFL-CIO*, 807 F.2d 618, 623 (7th Cir. 1986),

> "This case 'has caused a shameful waste of judicial manpower.' . . . The appellant has caused this court to spend valuable time and energy on a completely meritless matter while the serious concerns of other litigants have had to wait for resolution. . . . Therefore, pursuant to Rule 38 of the Federal Rules of Appellate Procedure, we award [the appellee] its costs and reasonable attorneys' fees on appeal . . . ."

Id. (citations omitted). Because the plaintiff was most likely without knowledge of the legal standard of review she faced on appeal, we direct that her appellate counsel, who should have known the appropriate legal standards, pay the appellee-defendant's costs and reasonable attorneys' fees stemming from this appeal. Pursuant to Circuit Rule 38, we must provide reasonable notice to counsel that we are contemplating sanctions and give an opportunity to respond. Counsel for Rennie shall submit its response to the sanctions to the clerk of this Court within fifteen days of the date of this opinion. Counsel for the Secretary of the Navy shall also submit to the clerk of this Court within fifteen days an accounting of attorney's fees and costs incurred in this appeal.

V. *CONCLUSION*

Rather than employing Title VII as a shield to protect her from prohibited conduct, it appears that the plaintiff is using the statute as a sword to gain a position with NAC for which she was unqualified. The record fails to support her claims.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 14, 1993
Before
HON. JOHN L. COFFEY, Circuit Judge
HON. FRANK H. EASTERBROOK, Circuit Judge
Hon. Harlington Wood, Jr., Senior Circuit Judge

No. 92-2644

MARY ANN CARTER RENNIE, *Plaintiff-Appellant* v.	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
JOHN DALTON, Secretary of the Navy, *Defendant-Appellee*	Nos. 86 C 1082 & 88 C 652 William E. Steckler, Senior Judge.

ORDER

In our opinion decided August 27, 1993, the court stated that Plaintiff-Appellant's appeal was frivolous and that the court was contemplating sanctions under Rule 38 of the Federal Rules of Appellate Procedure. Pursuant to Circuit Rule 38, the court directed counsel for Rennie to submit a response to sanctions and ordered counsel for the Secretary of the Navy to submit an accounting of attorney's fees and costs incurred in this appeal. After consideration of the Plaintiff-Appellant's "Response to Sanctions" and the Defendant-Appellee's "Accounting for Attorney's Fees and Costs," the court holds that sanctions are appropriate. Plaintiff-Appellant's counsel has not objected to the Accounting for Attorney's Fees and Costs. Nonetheless, the court finds the hourly rate of $150 requested by counsel for Defendant-Appellee to be excessive and instead holds that an hourly rate of $110 will be applied in calculating the fee award.

We therefore impose sanctions against Richard L. Darst, Rennie's counsel, in the amount of $7,370.00, plus costs in the amount of $520.62, payable by check to the appellee. Darst must pay the sanctions within thirty days of this order.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MARY ANN CARTER RENNIE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. IP 86-1082-C
	)	No. IP 88-0652-C
H. LAWRENCE GARRETT,	)	
SECRETARY OF THE NAVY,	)	
	)	
Defendant	)	

JUDGMENT

This action came on for trial before the Court, without a jury, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff take nothing by her complaints and that the action be dismissed on the merits.

Dated at Indianapolis, Indiana, this 11th day of June, 1992.

/s/ William E. Steckler

United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MARY ANN CARTER RENNIE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. IP 86-1082-C
	)	No. IP 88-0652-C
H. LAWRENCE GARRETT,	)	
SECRETARY OF THE NAVY,	)	
	)	
Defendant	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Court for hearing on plaintiff's charges of sexual harassment, retaliatory harassment, and sex discrimination. A four day trial was held in September, 1991 and after extensive briefing by both sides, closing arguments were held May 12, 1992.

The Court, having considered the pleadings, oral testimony, evidence, oral arguments, briefs, and proposed findings of fact and conclusions of law, now enters the following findings of fact and conclusions of law, pursuant to Rule 52 of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

1. The Naval Avionics Center ("NAC") is a civilian facility operated by the U.S. Department of the Navy.

2. NAC is located in Indianapolis, Indiana and employs over 3,000 people.

3. NAC is involved in the manufacture of customized electronic components for Navy equipment, including classified equipment, "smart bombs," radios, communications equipment, navigation equipment, sonar, and radar.

4. Mary Ann Carter Rennie, plaintiff, is a resident of Indianapolis, Indiana.

5. In March, 1982, NAC hired plaintiff as a temporary employee in the position of Electronics Mechanical Helper ("EMH").

6. On March 29, 1982, plaintiff began work at NAC and was informed that her continued employment on a temporary basis was dependent upon her taking and passing a solderfication course offered by NAC to those in the position of EMH.

THE FIRST SOLDERFICATION COURSE

7. The solderfication course in which plaintiff was enrolled began on Thursday, April 8, 1982. Plaintiff completed the course on April 16, 1982.

8. The instructor of the course was J.J. Cafrelli.

9. Students enrolled in the course were plaintiff, Lamona Leal, Robby Sharp, and Jeffrey Allen Moore.

10. On the first day of class, the instructor told the following off-color joke: The instructor's mother-in-law and brother-in-law were at the golf course and the mother-in-law asked her son-in-law if he wanted to "wash his balls." The son-in-law replied, "No thanks, I took a shower this morning."

11. Ms. Leal rebuked the instructor for telling the off-color joke and the instructor later apologized to the class.

12. Plaintiff did not complain to the instructor about the off-color joke.

13. Ms. Leal eventually left her job with NAC and now works outside of Indiana.

14. The instructor participated in a discussion among the students regarding a strip bar known locally as the "Harem House."

15. The off-color joke and the discussion regarding the strip bar were not directed towards plaintiff.

16. The instructor also observed to the students that if he were teaching black students he would wear a turtleneck. The instructor's observation was premised upon a book he had read that indicated

certain groups could relate better to individuals not wearing a suit and tie.

17. The course was conducted in a room that was approximately 20′ x 40′ and which contained work benches and cabinets, causing the room to be cramped and crowded. It was difficult for even a single individual to pass-by another while travelling from one end of the room to another.

18. Due to the closeness of the classroom, if any off-color comments had been made to plaintiff or if the instructor had stared at plaintiff for periods of up to 30 minutes then the other students in the class would have heard such comments and noticed such behavior on the part of the instructor.

19. Neither Lamona Leal, Robby Sharp, nor Jeffrey Allen Moore observed the instructor staring at plaintiff, directing off-color comments towards plaintiff, nor touching or rubbing against plaintiff in any offensive manner.

20. No student, other than plaintiff, recalls hearing the instructor make any off-color remarks other than the golf-ball joke.

21. The instructor paid additional attention to plaintiff because she was the only student in the class who was having difficulty with the soldering. The instructor sat close to plaintiff to help her with her work.

22. Plaintiff told others that the instructor made her nervous.

23. The instructor let plaintiff smoke during class despite NAC's policy against smoking in the classroom. Plaintiff was the first person the instructor allowed to smoke in class.

24. Given the small number of students in the class, the small size of the classroom, and the educational nature of the endeavor, it was necessary for the instructor to visually observe plaintiff.

25. The instructor's visual observation of plaintiff was not sexual in nature. He was an instructor and as such was required to observe his students.

26. Plaintiff lacked the manual dexterity necessary to meet the NAC soldering standards.

27. To determine whether a student could meet soldering

requirements, NAC administered both a written and practical examination.

28. The practical examination consisted of a student demonstrating various soldering techniques on a chassis and a printed wiring board.

29. The instructor typically graded both the written examination and the practical examination.

30. Following the first class, the instructor graded plaintiff's written examination but did not grade plaintiff's practical examination. Plaintiff passed the written examination.

31. The instructor wrote two answers on plaintiff's written examination. It was the instructor's practice to talk with a student about an answer and if the student had the knowledge but didn't understand the question then the instructor would write the answer on the test.

32. One of the techniques to be tested on the chassis involved "lacing." The instructor reattached plaintiff's lacing on her chassis but did not repair the lacing.

33. The instructor declined to grade plaintiff's first soldering examination because he felt plaintiff had exhibited an animosity towards him.

34. Once the instructor graded the soldering examinations, the boards and chassis were sent to the Quality Audits Department which reviewed the scores given the boards by the instructor and which also assigned a score to plaintiff's board.

35. Before sending the examinations to Quality Audits, the examinations were identified by a number assigned to each student. No individual names were connected with the work product resulting from the practical examination and only the instructor knew which students produced which work.

36. To pass the course, each student needed to score 70 points or better.

37. Quality Audits awarded plaintiff's board 38 points.

38. Larry Songer of Quality Audits reviewed plaintiff's board.

39. After reviewing plaintiff's board, Mr. Songer took plaintiff's board to Mr. Charles Reuter, Chief of Quality Audits.

40. Mr. Reuter is one of only three "Grade A" senior examiners for the military in the entire country and is one of the foremost experts in the country on military soldering.

41. Mr. Reuter confirmed the score awarded plaintiff's test by Mr. Songer.

42. All the students' work was identified to Quality Audits by the students' numbers and not the students' names.

43. Neither Mr. Songer nor Mr. Reuter knew which chassis and boards belonged to which students.

44. As a result of her inability to solder, plaintiff failed the solderfication course and was required to repeat the solderfication course and practical examination.

THE SECOND SOLDERFICATION COURSE

45. On Monday, April 26, 1982, plaintiff began her second solderfication class.

46. The other student in the second solderfication class was Jesse Ray Crosby, a black male, who had also failed his first solderfication course.

47. At the time of trial, Mr. Crosby no longer worked for NAC.

48. The second solderfication class was held in the same classroom as the first solderfication course.

49. The instructor of the second solderfication course was J.J. Cafrelli.

50. As there were only two students in the small classroom, it was necessary for the instructor to visually observe the plaintiff.

51. Given that there were only two students in the classroom, both of which had previously failed the course, it was not unreasonable for the instructor to request that the plaintiff locate herself in the front of the classroom.

52. Mr. Crosby observed that plaintiff was having difficulty understanding the coursework.

53. During the second class, plaintiff informed the instructor that

she was contemplating filing a complaint with the EEO regarding his alleged harassment of her.

54. On Tuesday, April 27, 1992 *[sic]*, the instructor met with his supervisor, Mr. Rance, to discuss what action the instructor needed to take in light of the threats made by plaintiff.

55. On Tuesday, April 27, 1982, at the request of Mr. Rance, plaintiff's immediate supervisor, Fred Seddon met with plaintiff to inquire as to any problems she might be having with the soldering course. Plaintiff informed Mr. Seddon that although she had previously had a small problem, it had been take care of and that "everything was okay."

56. Mr. Rance advised the instructor to keep his distance from plaintiff so as not to exacerbate the situation.

57. On Wednesday, April 28, 1992 *[sic]*, plaintiff went to the EEO office to complain that she was being sexually harassed by the instructor. Plaintiff's primary complaint at that time was that the instructor was staring at her and giving her the "eye."

58. Thursday, April 29, 1992 *[sic]*, was the first class day following the instructor's learning of plaintiff's EEO complaint.

59. Before entering the classroom on Thursday, April 29, 1982, the instructor was advised by Mr. Rance to keep himself "separate" from plaintiff so as not to exacerbate the situation.

60. On Thursday, April 29, 1982, after learning of plaintiff's complaint, the instructor placed a blackboard between himself and plaintiff and in such a manner that only Mr. Crosby would see the instructor.

61. The instructor placed the blackboard between himself and plaintiff because it would mean the plaintiff would be unable to accuse the instructor of staring at her.

62. On Thursday, April 29, 1982, plaintiff began the practical portion of her soldering examination. The examination was conducted in the same classroom where the solderfication course was held.

63. Although he sat behind the blackboard, visible only to Mr. Crosby, the instructor continued to answer the students' questions and to work with the students.

64. It was plaintiff's decision not to seek the instructor's assistance with her soldering.

65. Mr. Crosby did not observe the instructor throwing plaintiff's soldering board or hear the instructor speaking angrily to plaintiff.

66. The instructor was not to instruct the two students during the soldering examination; therefore, contact between plaintiff and the instructor was unnecessary unless plaintiff had a question.

67. The instructor asked Mr. Crosby not to assist plaintiff with her soldering as Mr. Crosby had also failed previously and might not give plaintiff correct advice.

68. Plaintiff completed the practical examination on Friday, April 30, 1982. Because plaintiff and Mr. Crosby had passed the written examination, neither was required to repeat it.

69. Plaintiff failed the practical examination for a second time after completing the second solderfication course. Plaintiff's classmate, Mr. Crosby, passed the practical examination.

70. The instructor graded plaintiff's soldering work following the second class and awarded plaintiff a score of 45.

71. After grading the students' work, the instructor sent their boards and chassis to Quality Audits.

72. Neither plaintiff's work nor Mr. Crosby's work was identified as belonging to a particular student and instead was identified only by number.

73. Mr. Songer of Quality Audits again reviewed plaintiff's work and adjusted plaintiff's score downward to 26 points.

74. Mr. Reuter again reviewed the board, the chassis, and the score awarded by Mr. Songer and affirmed the score of 26 points.

75. Neither Mr. Reuter nor Mr. Songer knew that plaintiff's soldering examination belonged to plaintiff.

76. Because plaintiff failed to pass the solderfication course, plaintiff was informed she would be terminated on May 8, 1982. Plaintiff's last day at work was May 6, 1982. Plaintiff failed to show-up for work on May 7 and 8, 1982.

PLAINTIFF NOT REHIRED NOR TRANSFERRED

77. Prior to her discharge, plaintiff had been working as a temporary employee in Branch 235.

78. Branch 235 consisted of five sections: wire preparation and major assembly; wire welding, wire wrapping, small cables and harnesses; major complex cables and coil winding; encapsulation; and microelectrons assembly.

79. Of the five sections, only encapsulation did not require that the temporary employee be able to solder.

80. Plaintiff was not qualified to be hired by the remaining four sections as she had failed the soldering course.

81. At the time of plaintiff's dismissal, there were no positions available in encapsulation (otherwise known as potting).

82. At the time of plaintiff's discharge, NAC lacked the authority to promote, reassign or transfer temporary employees to other jobs. If plaintiff had wished to continue working at NAC she would have had to receive a new temporary appointment.

83. For at least two years following plaintiff's May, 1982 dismissal, no new employees, including temporary employees, were hired for the encapsulation section.

84. Plaintiff applied to be rehired on February 3, 1983.

85. Plaintiff's "Notice of Rating" issued in connection with her February, 1983 application, shows that plaintiff was considered eligible only for the position of EMH, the same position from which she was released in 1982 after twice-failing the soldering course.

86. No evidence was presented indicating that plaintiff had sought any position other than that of EMH or what qualifications were held by plaintiff for positions other than EMH that might have been available at NAC during the time plaintiff sought to be rehired, either in 1982 or in 1983.

87. When plaintiff applied to be rehired in February, 1983, she was informed that to receive consideration she would have to notify NAC if she wanted to remain on the list of eligible individuals to be called in the event of an opening or else after six months her application would "expire."

88. Plaintiff failed to take the steps necessary to keep her name on the list of individuals eligible for hire by NAC; thus, plaintiff's 1983 application expired on August 3, 1983.

89. The subsequent soldering experience gained by plaintiff in private industry following her discharge from NAC was a different type of soldering than that utilized by NAC.

90. NAC's soldering standards are higher than private industry given the nature of the weaponry, navigational aids, and other military-related systems produced by NAC.

91. A total of five persons are known to have failed the soldering test: Almedia Sanders, an unidentified gentleman suffering from dyslexia, Yaeko Alexander, Lester Wafford and Angie Govan.

92. Almedia Sanders was a permanent employee who had been at NAC for 34 years. After failing the solderfication course in 1979, the soldering requirement was dropped from her job description and she retired in 1980.

93. The unidentified man suffering from dyslexia was also hired as a temporary employee at a time when temporary employees could not be transferred. After failing the written examination, the man was hired into another position that happened to be available at the time.

94. Yaeko Alexander, Lester Wafford, and Angie Govan were discharged after failing the soldering course. None of the three were rehired.

THE INSTRUCTOR

95. Mr. Cafrelli's appointment as instructor was temporary. During 1982, NAC did not utilize fulltime permanent instructors but instead appointed temporary instructors from among its floor employees.

96. During his time as temporary instructor in 1982, Mr. Cafrelli taught approximately 100 students.

97. Of the 100 students taught by Mr. Cafrelli, only two students were discharged because of their failure to pass the course.

98. The two students who failed to pass the course were plaintiff and a second woman, Yaeko Alexander.

99. At no time did the instructor offensively touch Ms. Alexander in any manner.

100. With the exception of plaintiff, all the students in both of plaintiff's soldering classes felt that the instructor was a good instructor.

TELEPHONE CALLS

101. Plaintiff started receiving harassing telephone calls at home about the time of her termination from NAC. The calls lasted for one month.

102. It is unknown who made the telephone calls.

HISTORY OF PLAINTIFF'S COMPLAINT AND EEO ACTION

103. Plaintiff's final day of work was May 8, 1982.

104. Plaintiff's final interview with the EEO counsellor was May 11, 1982. Prior to plaintiff's final interview, the EEO counsellor spoke with class members and supervisory personnel.

105. On May 11, 1982, the EEO counsellor advised plaintiff that no one would substantiate plaintiff's claim; that plaintiff was hired as a temporary employee for a specific position; and that when plaintiff failed to pass the solderfication course, it was impossible for NAC to place her elsewhere.

106. On May 18, 1982, plaintiff filed a written complaint with the EEO office.

107. On June 9, 1982, NAC requested the appointment of an EEO investigator by the Naval Civilian Personnel Command, Northern Field Division, Philadelphia, Pennsylvania.

108. On July 12, 1982, the EEO office of NAC was notified that an investigator had been appointed.

109. On November 18, 1982, the EEO office of NAC issued the investigator's report recommending a finding that plaintiff was not sexually harassed, sexually discriminated against and/or discharged in retaliation for complaining of alleged Title VII violations.

110. Plaintiff expressed her dissatisfaction with the findings of November 18, 1982 and received a review of her complaint by a complaint examiner from the Equal Employment Opportunity Commission ("EEOC").

111. Following a request for continuance by plaintiff's counsel, the hearing before the EEOC was held May 20, 1983.

112. On December 29, 1983, the EEOC complaints examiner issued a proposed ruling, finding that based upon the instructor's remarks regarding the washing of golf-balls, the instructor had engaged in sexual harassment. The EEOC complaints examiner found no evidence that the instructor made any sexual advances nor any evidence supporting plaintiff's claim that she suffered sex discrimination other than hostile environment harassment nor did the complaints examiner believe plaintiff was discharged in retaliation for complaining of Title VII violations.

113. On May 17, 1984, after reviewing the recommendation by the EEOC complaints examiner, the Secretary of the Navy declined to follow the report of the complaints examiner of the grounds that a single off-color joke does not qualify as a hostile environment type of sexual harassment.

114. Plaintiff then elected to appeal the Navy's decision to the EEOC.

115. On June 25, 1986, the EEOC issued its opinion affirming the Navy's decision of May 17, 1984.

116. Plaintiff then filed the instant lawsuit in 1986.

117. In 1988, plaintiff filed a second lawsuit alleging that she had been retaliated against because NAC had refused to rehire her after she had complained to the EEO office of sex discrimination. Following Seventh Circuit precedent, the Court dismissed these allegations on the grounds that plaintiff was required first to file a timely complaint with NAC's EEO office. The Seventh Circuit overruled its prior holding and remanded the action back to this Court.

CONCLUSIONS OF LAW

SEXUAL HARASSMENT

1. Title VII of the 1964 Civil Rights Act provides as follows:

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to . . . compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex; or (2) to limit, segregate, or classify . . . employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect [her] status as an employee, because of such individual's sex.

42 U.S.C. § 2003-2(a) (1982). This language has been interpreted as prohibiting the sexual harassment of employees.

2. Under the Civil Rights Act of 1964, Congress gave the Equal Employment Opportunity Commission the power to issue regulations. The EEOC "regulations are nonbinding 'administrative interpretations' of the Civil Rights Act, but 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' " Alba Conte, *Sexual Harassment In The Workplace: Law and Practice* 14 (1990) (citing Smith, *Prologue to the EEOC Guidelines*, 10 Cap. U.L. Rev. 471, 472 (1981)).

3. The EEOC has issued the following regulation defining sexual harassment:

> (a) Harassment on the basis of sex is a violation of section 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. §1604.11(a). This definition has been accepted by the Supreme Court. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1985).

4. The two most common forms of sexual harassment are (1)

creating a hostile working environment and (2) trading sexual favors for a tangible benefit or *quid pro quo*.

Hostile Environment Sexual Harassment

5. In a hostile environment case, the threshold issue before a Court is whether the alleged offender's actions "rise to a level of 'hostility' offensive enough to be actionable." *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 213 (7th Cir. 1986).

6. An actionable level of conduct arises where the sexual harassment is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive environment.'" *Meritor*, 477 U.S. at 67. The Seventh Circuit has interpreted "abusive environment" to mean that "the demeaning conduct and sexual stereotyping cause such anxiety and debilitation to the plaintiff that working conditions were 'poisoned' within the meaning of Title VII. *Brooms v. Regal Tube Co.*, 881 F.2d 412, 418 (7th Cir. 1989).

7. To determine whether working conditions are "poisoned", a district court in the Seventh Circuit must examine the circumstances from both a subjective and objective standpoint. *Brooms*, 881 F.2d at 419. "Only if the court concludes that the conduct would adversely affect the work performance and the wellbeing of both a reasonable person and the particular plaintiff bringing the action may it find that the defendant has violated the plaintiff's rights under Title VII." *Id.*

8. In making this evaluation, the court looks at a number of objective and subjective factors including: "nature of the alleged harassment, the background and experience of the plaintiff, her coworkers and supervisors, the totality of the physical environment of the plaintiff's work area, the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs coupled with the reasonable expectation of the plaintiff upon voluntarily entering the environment." *Id.*

9. "Isolated and/or trivial remarks of a sexual nature" do not satisfy the definition of sexual harassment: "the offensive conduct must be persistent." *Downes v. F.A.A.*, 775 F.2d 288, 293 (D.C. Cir. 1985). All the instant case presents are two isolated incidents, the

telling of an off-color joke by the instructor and his participation in a discussion regarding a local strip bar.

10. Plaintiff can point to no further instances where the instructor made inappropriate remarks. Instead, plaintiff merely makes the broad allegation that the instructor made off-color remarks frequently. Without testimony setting forth the content of those statements, the context in which they were made, and the circumstances under which they were uttered, there simply is no evidence that additional off-color remarks were made.

11. The other woman in the class and the remainder of the male students did not consider the environment of the classroom to be one filled with sexual innuendo, sexual remarks or sexually-oriented actions. Given the size of the classroom, if the instructor had made additional off-color remarks during class, the other students would have heard such remarks. There is no evidence in the record that the instructor made such remarks while alone with plaintiff.

12. Plaintiff claims that the instructor rubbed his penis against her posterior and that when she moved forward, he also moved forward. She also claims that he frequently touched her on the shoulder and the back. No other student substantiates plaintiff's claim that she was touched in such a manner by the instructor and plaintiff does not claim that this occurred during a time when no other students were present. The instructor denies that such an incident occurred. Plaintiff has failed to sufficiently support her claim.

13. While the instructor showed a lack of judgment in telling an off-color joke, the Court finds it did not create a hostile environment in that a reasonable woman would not have allowed the telling of one off-color joke to interfere with her work performance.

FAILURE TO TAKE PROMPT REMEDIAL ACTION

14. The issue of whether an employer moves quickly to correct a Title VII violation arises in connection with employer liability. For example, in cases of sexual harassment, an employer is liable for the torts of a coworker against another if the employer knows of the misconduct and fails to take prompt remedial action. *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990).

15. Plaintiff appears to take the position that an employer's failure to take prompt remedial action is a cause of action unto itself. In support of this statement, plaintiff cites *Guess, Daniels v. Essex Group, Inc.*, 937 F.2d 1264 (7th Cir. 1991) and *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991). These cases do not support plaintiff's proposition. Each of these cases discusses remedial action in connection with the issue of whether the employer will be held liable for the actions of one co-worker against another. None of these cases hold that an employer's failure to take prompt remedial action is an independent cause of action.

16. As the NAC is not disputing its potential liability for the alleged actions of its employees, any agency issue raised by plaintiff of NAC's alleged failure to take prompt remedial action need not be dealt with by the Court.

Quid Pro Quo Sexual Harassment

17. In a quid pro quo sexual harassment case, the plaintiff must prove the following:

- The employee belongs to a protected group;
- The employee was subject to unwelcome sexual harassment;
- The harassment complained of was based upon sex;
- The employee's reaction to harassment complained of affected tangible aspects of the employee's compensation, terms, conditions, or privileges of employment;
- Employer liability.

Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir.).

18. In the present case, plaintiff admits that the instructor never expressly offered to pass her from the class in exchange for sexual favors; however, plaintiff claims that she implied such an offer from the instructor's treatment of her.

19. All of the alleged "favors" performed by the instructor, e.g., allowing plaintiff to smoke in class, reattaching the lacing on her chassis, providing two answers on plaintiff's examination, are the

types of things a well-intentioned, inexperienced instructor might do to assist a student who is having difficulties. Without some kind of additional proof that the instructor did these things with the expectation of receiving sexual favors, the Court simply cannot find by a preponderance of the evidence that a wink, a leer and a nudge accompanied any of these alleged "favors."

20. None of the students who were present in the classroom with plaintiff and the instructor observed the harassment of plaintiff by the instructor. The logistics of the situation would have required someone to notice if such harassment were really occurring.

RETALIATION

21. Section 704(a) of the Civil Rights Act of 1964 provides that it is unlawful for an employer to retaliate against an employee who has engaged in an activity directed at discouraging race or sex discrimination in the workplace. It provides as follows:

> (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [s]he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge . . . under this subchapter.

28 U.S.C. § 2000e-3(a).

22. A plaintiff seeking to prove a case of retaliation must satisfy the shifting burdens of proof first enunciated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). As articulated by the Seventh Circuit Court of Appeals:

> Under this framework, we must first ask whether the plaintiff can establish a prima facie case of discrimination. If the plaintiff successfully establishes a prima facie case, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its challenged action. Once such a reason has been articulated, the burden shifts back to the plaintiff to show that the articulated reason is pretextual. This can be accomplished by showing, through circumstantial evidence, that the employer's articulated explanation is not worthy

> of credence. Such a showing permits an inference of discrimination. (citations omitted).

Holland v. Jefferson National Life Insurance Co., 883 F.2d 1307, 1313 (7th Cir. 1989).

23. A prima facie case is found when a plaintiff can show "(1) she engaged in statutorily protected expression; (2) she suffered an adverse action by her employer; and (3) there is a causal link between the protected expression and the adverse action." *Id.*

24. In the present case, plaintiff engaged in statutorily protected expression when she voiced her complaint to the EEO office.

25. As for the second element of plaintiff's prima facie case, plaintiff claims she suffered adverse treatment in that (1) an employee of NAC made obscene phone calls to plaintiff (2) the instructor treated her badly during the second class; (3) NAC failed to transfer her to another position upon her failure of the soldering class; and (4) NAC failed to rehire her in another position.

26. The Court finds that the obscene telephone calls do not qualify as adverse action by NAC against plaintiff because it is unknown who made the telephone calls, i.e., a disgruntled suitor or former friend of plaintiff's or an NAC employee.

27. The Court finds that the placement of the blackboard between the instructor and plaintiff during the practical examination does not qualify as adverse treatment as the instructor continued to answer questions and work with the students whenever needed during their examination. It was plaintiff's decision not to seek the instructor's assistance.

28. The Court finds that NAC's refusal to transfer plaintiff is not adverse action causally linked to the filing of her Title VII complaint because NAC's regulations at the time of plaintiff's discharge prohibited NAC from transferring any temporary employee.

29. Plaintiff also fails to create a causal link between NAC's failure to rehire plaintiff immediately following the voicing of her complaint. Of the sections contained in Branch 235, only encapsulation did not require soldering skills. There were simply no openings

for temporary employees in encapsulation at the time of plaintiff's dismissal.

30. Even if plaintiff did establish a prima facie case, plaintiff failed to show that NAC's articulated reason for not rehiring plaintiff immediately upon her discharge is pretextual. Plaintiff did not bring forward any evidence showing that there were openings available for temporary employees for which plaintiff was qualified. The dropping of soldering requirements for Almedia Sanders and the rehiring of the dyslexic temporary employee into a nonsoldering position do not show that NAC's decision was pretextual. In the case of the unidentified dyslexic employee, unlike the situation with plaintiff, there was an opening available. In the case of Ms. Sanders, she was a long time employee who was about to retire.

31. Plaintiff fails to establish a causal link between the filing of her complaint and NAC's failure to rehire plaintiff following her 1983 application. At the time of her application, plaintiff's notice of rating indicates she was considered eligible only for the position of EMH. Plaintiff presents no evidence that she sought employment as anything other than an EMH in 1983. NAC refused to hire plaintiff because she had previously failed the soldering examination. Plaintiff had been given two opportunities to pass the examination but failed each time. Passing the examination was a requirement for all EMH's. On this basis, it was not unreasonable for NAC to decline to hire plaintiff as an EMH.

32. Even if plaintiff has established a prima facie case that NAC failed to rehire plaintiff in 1983 in retaliation for her complaining of alleged Title VII violations, plaintiff has failed to show NAC's reasons articulated in the preceding paragraph are pretextual.

33. The Court also finds that NAC's alleged refusal to rehire plaintiff in 1988 also does not constitute an adverse employment action that is causally linked to registering her Title VII complaint. Other than plaintiff's self-serving statement that while at NAC filing a second complaint with the EEO office, she asked to be rehired, there is no evidence in the record that plaintiff took the necessary steps to be considered for rehire, e.g., completing an application,

visiting the personnel office, etc. As plaintiff made the visit to NAC in 1988 accompanied by her attorney, for all this Court knows on the basis of the evidence before it, the issue of rehire could have been one raised while discussing settlement of plaintiff's lawsuit.

Retaliatory Discharge

34. Plaintiff argues that she was discharged because she failed the second test and that the reason she failed the second soldering test is that the instructor retaliated against plaintiff after she filed her EEO complaint by separating himself from her with a blackboard.[1]

35. Assuming arguendo that such proposed logic (outlined in plaintiff's post-trial reply brief, p.p. 24-25), could serve as the basis of a claim of retaliatory discharge, it need not be addressed by the Court as the Court has concluded there was no retaliation.

36. Even if plaintiff were attempting to argue the more "traditional" type of retaliatory discharge case, plaintiff has failed to show that she is entitled to recover. Plaintiff's visit to the EEO office satisfies the first requirement necessary for a prima facie case while her discharge satisfies the second requirement. Assuming arguendo that the proximity in time of plaintiff's discharge and the lodging of her complaint creates "an inference that the two are causally connected", *see Johnson v. Sullivan*, 945 F.2d 976, 980 (7th Cir. 1991), plaintiff has failed to show that NAC's articulated reason for plaintiff's discharge is pretext. NAC claims it fired plaintiff because she failed to pass the soldering examination, a requirement for all temporary

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[1] The Court notes that in her complaint, plaintiff does not plead that she was discharged in retaliation for lodging a Title VII complaint. In fact, despite plaintiff's deluging of the Court with paper, it is never made clear whether plaintiff is pleading retaliatory discharge or a discharge on the basis of her sex. Plaintiff's avoidance of committing herself to a particular theory of recovery is a recurring problem throughout this case. This problem is most clear in the disparate treatment and disparate impact portions of plaintiff's post-trial brief wherein plaintiff resents little or no particularized application of the law to the facts of her case.

As the Seventh Circuit has observed: "Each party must sharpen his own claims; those left in amorphous form by counsel need not be honed and decided by the judge." *Benzies v. Illinois Department of Mental Health and Developmental Disabilities*, 810 F.2d 146, 149 (7th Cir. 1987).

EMH employees. Nothing in the record indicates NAC's articulated reason for her firing is pretext.

SEX DISCRIMINATION

37. Section 703(a) of Title VII provides as follows:

> (a) It shall be an unlawful employment practice for an employer —
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> >
> > (2) to limit, segregate, or classify his employees or applicants for employment in anyway which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

38. When there is no direct evidence of a discriminatory motive then the court must utilize the shifting burdens of proof articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), otherwise known as disparate treatment. Another method of proving sex discrimination is by showing with the aid of statistics that "a facially neutral employment practice has a discriminatory impact on a protected class." *Morgan v. Harris Trust and Savings Bank of Chicago*, 867 F.2d, 1023, 1027 (7th Cir. 1989).

Disparate Treatment

39. Under a disparate treatment analysis, the plaintiff must establish a prima facie case, the defendant then has the burden of producing evidence supporting a legitimate, non-discriminatory reason for the employer's actions. Plaintiff then is able to show the defendant's articulated reason is pretextual. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

40. Assuming arguendo that Title VII applies to the actions complained of by plaintiff, plaintiff fails to establish a prima facie case of disparate treatment.

41. Plaintiff first complains that she was discriminated against when the instructor graded all the students' tests in the first class except for plaintiff's which was graded the first-time by Quality Audits. Plaintiff's prima facie case would require her to make a showing that (1) she belongs to a protected class; (2) that she took the examination; (3) that despite her responding correctly to the examination she was given a failing grade; (4) that other students in the class who responded in a similar manner were awarded passing grades. *See McDonnell Douglas v. Green*, 411 U.S. 792 (1973) (establishing prima facie case); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (prima facie standard should be adjusted for facts of each case).

42. Plaintiff fails to make any showing that she soldered the examination correctly. Instead, plaintiff argues that the instructor usually scored the examinations higher than Quality Audits and thus she was prejudiced when the instructor refused to grade her examination and instead allowed it to be graded by Quality Audits. Even if the instructor had graded plaintiff's examination and had scored plaintiff higher, Quality Audits had the power to reduce the instructor's grade which is exactly what Quality Audits did when the instructor graded plaintiff's second practical examination.

43. Assuming arguendo plaintiff can establish a prima facie case, plaintiff has failed to establish pretext. The instructor's stated reason for not grading plaintiff's test is that he knew plaintiff felt animosity towards him; therefore, to avoid any claims of impropriety, the instructor declined to grade plaintiff's examination. Plaintiff has produced no evidence to show that the instructor's reason is merely a pretext.

44. Plaintiff also claims she was discriminated against when the instructor placed a blackboard between himself and plaintiff, obstructing plaintiff's view of the instructor but not interfering with the view of the instructor by Mr. Crosby, the other student in the

second class. Modifying the *McDonnell Douglas* standard, plaintiff's prima facie case would require her to show (1) that she belongs to a protected class of persons; (2) that she attended the soldering class; (3) that despite her attendance, the instructor refused to work with and teach plaintiff; (4) that the instructor willingly worked with and taught other students.

45. The instructor's articulated reason for moving the blackboard was that he had been advised to keep himself "separate" from plaintiff so as not to exacerbate the situation between he and plaintiff. Plaintiff's primary complaint against the instructor was that the instructor stared at her.

46. The day the instructor moved the blackboard was the day the practical examination began and instruction was to stop. The instructor remained available and willing to answer questions. Plaintiff claims she decided not to ask the instructor for assistance after she had gone to him with one question and in response he had thrown plaintiff's board on the desk and talked to her angrily. The other student in the room did not see this occur.

47. The Court finds that although moving the blackboard may have been a somewhat childish response to a problem, the instructor was still available to the students and it was plaintiff who made the concious decision not to ask his assistance.

48. Plaintiff also alleges that she was discriminated against because NAC rehired a dyslexic male student, who had previously failed the soldering examination, into a non-soldering position. To establish a prima facie case, plaintiff must show (1) that she belongs to a protected class; (2) that she applied and qualified for a job for which the employer was seeking applicants; (3) that, despite being eligible and qualified, she was rejected; and (4) that, after her rejection the employer continued to seek applicants. *See McDonnell Douglas v. Green*, 411 U.S. 792 (1973) (establishing prima facie case); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (prima facie standard should be adjusted for facts of case).

49. NAC observes that at the time the dyslexic student failed, there happened to be an opening that did not require soldering skills

and that such was not the case at the time of plaintiff's discharge. Plaintiff has provided no evidence showing that there were other positions available for which she could be rehired and for which applications were being taken.

50. Even if plaintiff were able to establish a prima facie case, plaintiff has failed to show NAC's reason for not rehiring her was pretextual. Again, plaintiff has provided no evidence showing there were positions available for which she was qualified or that she made application for such positions. To establish pretext, the plaintiff must present the Court with more than mere disbelief. *See Benzies v. Illinois Department of Mental Health and Developmental Disabilities*, 810 F.2d 146 (7th Cir. 1987) ("The plaintiff must show that intentional discrimination caused the employer to take some unfavorable action").

51. The Court finds totally irrelevant to this action the claim of plaintiff that the instructor was racially prejudiced. According to plaintiff, if the instructor were racially prejudiced it could be inferred that the instructor would discriminate against women. This is much like inferring that because someone does not like red she will also not like pink.

52. Even if it were relevant, the single statement relied upon by plaintiff as establishing the instructor's prejudice does not do so. The instructor's remark about wearing a turtleneck if he were teaching a group of black persons, although inartfully paraphrased, was shown by plaintiff to have no other meaning than that explained by defendant, i.e., better communication between groups is found when all can find a common ground. There is no doubt that among certain groups, black or white, one could find an automatic distrust of any individual wearing a suit and tie. The Court has no reason to disbelieve the instructor's explanation of his remark.

DISPARATE IMPACT

53. A prima facie case of disparate impact is established by showing through significant statistical disparity that a facially neutral employment practice has a discriminatory impact on a protected

class. *Morgan v. Harris Trust and Savings Bank of Chicago*, 867 F.2d 1023, 1027 (7th Cir. 1989). "Where the sample size or alleged effect is so statistically insignificant that no inference of discriminatory impact is proper, plaintiff fails to present a prima facie case." *Morgan*, 867 F.2d at 1028.

54. Like the plaintiff in *Morgan*, plaintiff in the present case has failed to establish a prima facie case of disparate impact. Plaintiff claims that the use of the blackboard to separate her from the instructor affected her ability to learn and her score on the examination to the point that she failed while Mr. Crosby, the male in the class, passed. This sample size (two people) is statistically insignificant. *See Morgan*, 867 F.2d at 1028 ("[C]ourt may not reliably extrapolate the existence of discriminatory impact" from sample of only 3 persons).

55. Plaintiff also claims that NAC's failure "to properly train instructors and supervisors in the prevention of sex harassment until 1988 or 1989" and "the use of a part-time temporary instructor from the floor of the shop instead of a fulltime dedicated instructor" were neutral policies that discriminatorily impacted upon plaintiff. Again, plaintiff has failed to establish a prima facie case of disparate impact. Plaintiff makes no statistical showing that the use of part-time temporary instructors impacted women nor that the lack of sexual harassment prevention classes caused women students in the soldering classes to be victims of sexual harassment.

56. Nor has plaintiff established a prima facie case under a disparate impact analysis showing that she was discriminated against as a result of NAC's failure to take prompt remedial action prior to her discharge. Plaintiff argues that she should have receiving counselling prior to her discharge or that she or the instructor should have been transferred. NAC's policy was to discharge all EMH temporary employees who failed the soldering examination. Plaintiff has failed to introduce any statistical evidence showing that this policy has a discriminatory impact upon women.

PLAINTIFF'S ALLEGATIONS OF DISCRIMINATION BY THE EEO OFFICE

57. It appears that plaintiff may be trying to allege that the EEO office discriminated against her in 1988 when she attempted to file a complaint of retaliation based upon NAC's alleged refusal to rehire plaintiff.

58. The EEO office declined to accept plaintiff's complaint on the grounds that it was untimely. The subsequent decision in *Rennie v. Garrett*, 896 F.2d 1057 (7th Cir. 1990) subsequently changed the law in this regard.

59. In remanding this action, the Seventh Circuit Court of Appeals advised this Court to "consider the position taken by several courts in cases against private defendants, that a complaint (such as the retaliation complaint at issue here) which is reasonably related to or arises out of an already filed discrimination complaint does not need to be separately presented to the EEO counselor. *Rennie*, 896 F.2d at 1062.

60. In the present cases, defendant agrees that plaintiff's 1988 allegations of retaliation arise out of or are related to plaintiff's first complaint. Thus under the dicta in *Rennie*, it is not necessary for plaintiff to have filed a complaint with the EEO office in 1988.

61. Yet although plaintiff is not required to file a new complaint, plaintiff insists her claims should be treated as if a new complaint had been filed. Plaintiff argues that NAC's EEO office is required to investigate her claims of retaliation. Plaintiff's argument is self-defeating. If plaintiff's position were true then plaintiff would be bound to wait for a repeat of the entire process involved in investigating plaintiff's original complaint before being able to continue with this lawsuit. *Rennie* does not say this and for good reason. This case began ten years ago. If additional time had to be spent investigating this case further, then the resolution of this matter would have gone well beyond the ten years that have already expired.

62. Plaintiff also argues that there is a delay in the Navy's appointment of an investigator. Plaintiff contends this is part of a

"pattern of delay" and in support of this contention presented a number of witnesses who allegedly waited long periods of time before an investigator was appointed.

63. In the present case, an investigator was appointed, the investigation completed, and the report issued within six months from the date plaintiff filed her written complaint. The Court does not find this to be an inordinate amount of time.

64. Plaintiff again argues that she should not have been dismissed upon failing the examination. Instead, she contends she should have received counselling or been transferred or allowed to take another soldering course under another instructor. There is no evidence of other non-soldering jobs available for someone of plaintiff's qualifications and regulations prohibited NAC from transferring plaintiff. Plaintiff points to no regulation, case law, or statute that requires NAC to keep plaintiff on its payroll until the EEO investigation is completed.

In light of the foregoing, the Court finds against plaintiff, Mary Ann Carter Rennie and for defendant, H. Lawrence Garrett, III, Secretary of the Navy.

Any finding of fact deemed to be a conclusion of law shall be treated as having been determined a conclusion of law. Any conclusion of law deemed to be a finding of fact shall be treated as having been determined a finding of fact.

IT IS SO ORDERED.

Dated this 11th day of June, 1992.

/s/ William E. Steckler

United States District Judge

Supreme Court, U.S.
FILED
JAN 28 1994
OFFICE OF THE CLERK

No. 93-831

In the Supreme Court of the United States

OCTOBER TERM, 1993

MARY ANN CARTER RENNIE AND RICHARD L. DARST,
PETITIONERS

v.

JOHN H. DALTON, SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

1. Whether the court of appeals erred in affirming the district court's finding that petitioner Rennie did not establish that respondent had created a hostile work environment due to sexual harassment or that respondent had retaliated against her, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, 2000e-16.

2. Whether the court of appeals abused its discretion or failed to provide adequate prior notice when it imposed sanctions on petitioner Darst under Federal Rule of Appellate Procedure 38 and Seventh Circuit Rule 38, based on its finding that he had filed a frivolous appeal on behalf of his client petitioner Rennie.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 3 F.3d 1100. The opinion of the district court (Pet. App. A24-A49) is unreported.

JURISDICTION

The judgment of the court of appeals on the merits of the case was entered on August 27, 1993. The order of the court of appeals imposing sanctions was entered on October 14, 1993. Pet. App. A21-A22. A petition for rehearing regarding sanctions was treated as a motion to reconsider sanctions and was denied on December 20, 1993. The petition for a writ of certiorari was filed on November 24, 1993. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Mary Ann Carter Rennie (Rennie) filed suit against respondent Secretary of the Navy, alleging sexual harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, 2000e-16. After a four-day bench trial, the district court ruled that the Navy had not discriminated against Rennie on the basis of sex and had not retaliated against her for claiming sexual harassment. Pet. App. A24-A49. The court of appeals affirmed. Pet. App. A1-A20. The court of appeals also sanctioned Rennie's counsel, petitioner Richard L. Darst (Darst), under Federal Rule of Appellate Procedure 38 and Seventh Circuit Rule 38, for filing a frivolous appeal. Pet. App. A18-A19, A21-A22.

1. In March, 1982, petitioner Rennie was hired for a temporary position at the Naval Avionics Center (NAC) in Indianapolis, Indiana. Pet. App. A24-A25. NAC was a civilian facility involved in the manufacture of electronic components for the United States Navy, and was operated by the Navy. Pet. App. A24. Rennie's continued employment was contingent upon her successful completion of a soldering course offered by NAC. Pet. App. A25.

Rennie's soldering course lasted approximately one week and consisted of four students, two men and two women, and was taught by a male instructor. Pet. App. A25. On the first day of the course, the instructor told an off-color joke involving a sexual reference. *Ibid.* The other female student rebuked the instructor for the joke and the instructor later apologized to

the class. *Ibid.* On another occasion, the instructor participated in a discussion among the students regarding a local strip bar. *Ibid.*

NAC administered both a written and a practical examination at the end of the course. Typically, the instructor graded both examinations and the Quality Audits department reviewed the examinations and independently assigned its own grade. Pet. App. A27. In Rennie's case, the instructor gave her a passing grade on her written examination, but did not grade her practical examination because he felt she had exhibited an animosity toward him. *Ibid.* The Quality Audits department graded the practical examinations without knowing the identity of the students and Rennie was given a failing grade. *Ibid.*

Because she failed the examination, Rennie was required to repeat the soldering course and the practical examination. Pet. App. A28. There were two students in Rennie's second class, Rennie and a male student who also had failed his first course. *Ibid.* The same instructor taught the course, which again lasted about one week. Pet. App. A28-A30.

During the second course, Rennie told the instructor that she was contemplating filing a complaint with the equal employment opportunity (EEO) office regarding his harassment of her. Pet. App. A28-A29. The instructor's supervisor subsequently met with Rennie and Rennie indicated that her problem had been taken care of and that "everything was okay." Pet. App. A29. The supervisor told the instructor to keep his distance from Rennie and to separate himself from her so as not to exacerbate the situation. Pet. App. A29. Rennie orally complained to the EEO office at NAC that she was being sexually harassed by the

instructor based primarily on her belief that he was staring at her. Pet. App. A29. The course instructor addressed the complaint by placing a blackboard between himself and Rennie during the second practical exam, which took place the following day. Pet. App. A29. Although he sat behind the blackboard, the instructor remained available to answer questions during the examination. *Ibid.* The instructor gave Rennie a failing grade on her practical examination. Pet. App. A30. The Quality Audits department again reviewed the practical examination without knowing the identity of the students and it graded Rennie's examination lower than the instructor had. Pet. App. A30. Because petitioner Rennie failed the soldering course, the Navy terminated her employment. Pet. App. A30.

2. Petitioner Rennie filed an EEO complaint. An EEOC complaints examiner issued a proposed ruling and found that the instructor had engaged in sexual harassment based on the one off-color joke. Pet. App. A34. The examiner did not believe, however, that Rennie had been discharged in retaliation for her complaints of Title VII violations. *Ibid.* The Secretary of the Navy declined to follow the report and concluded that the single joke did not result in a hostile work environment or sexual harassment. *Ibid.* The EEOC affirmed the Navy's decision. *Ibid.* Rennie then filed the instant suit alleging sexual harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2, 2000e3, 2000e-16.[1]

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[1] Petitioner filed a second suit alleging retaliation based on NAC's refusal to rehire her. Pet. App. A8. The district court

3. The district court conducted a four-day bench trial and received post-trial briefing and oral submissions from counsel. Pet. App. A24. The court entered judgment for respondent on the ground that Rennie failed to demonstrate hostile work environment sexual harassment, quid pro quo sexual harassment, retaliation, disparate treatment sex discrimination, disparate impact sex discrimination, or discrimination by the EEO office. Pet. App. A34-A49.

With regard to the hostile work environment claim, the district court found that no student, other than Rennie, recalled hearing the instructor make any off-color remarks other than the one joke and the strip bar discussion. Pet. App. A26, A37. No student recalled observing the instructor stare at Rennie, or touch or rub against her in any offensive manner as Rennie claimed. *Id.* at A26, A37. The court specifically found that the classroom was so small that the other students would have heard or seen such behavior if it had occurred. *Id.* at A26, A37, A39. The district court found that all the case presented were two isolated incidents of inappropriate off-color remarks. Pet. App. A36-A37. The court concluded that "[w]hile the instructor showed a lack of judgment in telling an off-color joke, the Court finds it did not create a hostile environment in that a reasonable woman would not have allowed the telling of one off-color joke to interfere with her work performance." Pet. App. A37.

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dismissed both complaints for failure to exhaust administrative remedies, but the court of appeals reversed. On remand, the parties agreed to treat the second complaint as an amendment of the first complaint. *Ibid.*

As for the retaliation claim, the district court found that Rennie had failed to state a prima facie case under the standard of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Pet. App. A39-A41. It concluded that she had not suffered an adverse action by her employer, specifically finding that the placement of the blackboard between her and the instructor did not qualify as adverse treatment because the instructor continued to answer questions and work with students as needed and it was Rennie's decision not to seek his assistance. Pet. App. A40. The court also found that Rennie did not establish retaliatory discharge because nothing in the record indicated that NAC's articulated reason for firing petitioner, *i.e.*, her failure of the examination, was pretextual. Pet. App. A42-A43.

4. The court of appeals affirmed. Pet. App. A1-A20. The court cited the five-part test set forth in *Swanson* v. *Elmhurst Chrysler Plymouth, Inc.*, 882 F.2d 1235, 1238 (7th Cir. 1989), cert. denied, 493 U.S. 1036 (1990). Pet. App. A11. It found that Rennie had established three elements including that "the harassment was based on sex." Pet. App. A11. The court found, however, that Rennie had failed to establish that she was subject to sexual advances or requests for sexual favors and failed to establish that the alleged sexual harassment "had the effect of unreasonably interfering with [her] work performance in creating an intimidating, hostile, or offensive working environment that affected seriously [her] psychological well-being." Pet. App. A12. The court reasoned that the alleged conduct did not interfere with Rennie's work performance because the record did not reveal "demeaning conduct and sexual

stereotyping [resulting in] anxiety and debilitation to the plaintiff [such] that working conditions were 'poisoned' within the meaning of Title VII." Pet. App. A12, quoting *Brooms* v. *Regal Tube Co.*, 881 F.2d 412, 418 (7th Cir. 1989), and *Scott* v. *Sears, Roebuck & Co.*, 798 F.2d 210, 213 (7th Cir. 1986). The court also found that petitioner failed to demonstrate that the instructor's conduct would have adversely affected the work performance of a reasonable person. Pet. App. A12. The court affirmed the district court's conclusion that petitioner lacked the skills to meet the NAC soldering standards. *Id.* at A13.

The court of appeals expressly noted that this Court had granted the petition for certiorari in *Harris* v. *Forklift Systems, Inc.*, cert. granted, 113 S. Ct. 1382 (1993), in which a district court had dismissed a plaintiff's sexual harassment claim because the alleged conduct did not "seriously affect [her] psychological well-being." Pet. App. A12 n.5. The court of appeals explained that while its opinion "mentioned this element ([e]ffect on psychological well-being), [the Court's] holding does not depend on it for not only did Rennie fail to present any evidence that the alleged conduct had a serious [e]ffect on her psychological well-being, but she also failed to establish that she 'was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature.'" *Ibid.*, quoting *Swanson*, 882 F.2d at 1238. The court of appeals concluded that "the isolated incidents fall short of the requisite level of hostility or pervasiveness needed to establish a hostile work environment violation under Title VII." Pet. App. A13. The court of appeals rejected the

argument that the district court failed to consider all the evidence in ruling on the sexual harassment claim, noting that the district court discussed both the joke and the conversation relating to the strip bar in a paragraph of its conclusions of law. Pet. App. A13.

The court of appeals also affirmed the district court's finding that the placement of the blackboard during Rennie's second practical exam was without retaliatory motive. Pet. App. A15. The court specifically found that Rennie failed to establish a prima facie case under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), because the placement of the blackboard "did not rise to the level of adverse treatment because the instructor still made himself available to answer questions and the placement of the blackboard was an attempt to respond to [Rennie's] concern that [the instructor] was staring." Pet. App. A15.

At the close of its opinion, the court of appeals found that the appeal was frivolous "as all [it] did was restate and reargue facts and credibility issues previously ruled upon in the district court." Pet. App. A18-A19. The court explained that it was of the opinion that sanctions were appropriate under Rule 38 of the Federal Rules of Appellate Procedure. Pet. App. A19. The court directed Rennie's counsel, petitioner Darst, "who should have known the appropriate legal standards," to pay respondent's costs and reasonable attorneys' fees stemming from the appeal. *Ibid.* Noting that under Seventh Circuit Rule 38, it had to provide counsel with notice that it was contemplating sanctions and give him an opportunity to respond, the court ordered that petitioner Darst

submit his response to sanctions within 15 days and that respondent submit an accounting of fees and costs. *Ibid.* After considering Darst's response, the court of appeals issued an order holding that sanctions were appropriate and imposed sanctions against Darst in the amount of $7,370, plus costs in the amount of $520.62. Pet. App. A22. Petitioner Darst sought reconsideration of the sanctions order which was denied.

ARGUMENT

1. a. Petitioner Rennie contends (Pet. 10-12) that the district court did not evaluate her hostile work environment claim based on the totality of the circumstances. She argues that in its conclusion of law rejecting that claim, the district court considered only the fact of the one off-color joke.

Rennie correctly points out that under *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57 (1986), and *Harris* v. *Forklift Systems, Inc.*, 114 S. Ct. 367 (1993), the totality of the circumstances must be taken into account by a court evaluating a sexual harassment claim. Rennie's argument, however, takes the district court's conclusion of law out of context. She focuses on paragraph 13 (Pet. 10) in which the district court mentioned only the one joke. The court, however, devoted nine paragraphs to analysis of Rennie's hostile work environment claim. Pet. App. A36-A37. The court took into account a number of factors, specifically mentioning the strip bar discussion. Pet. App. A37. The court found that Rennie failed to support her claim with other incidents due in part to the conflicting testimony of other witnesses. *Ibid.* The court of appeals also conducted a totality of the

circumstances analysis of Rennie's hostile work environment claim (Pet. App. A9-A13), and recognized that its review on that legal issue was de novo. Pet. App. A9.

b. Rennie also claims that, despite the court of appeals' statement "that its holding does not depend on the psychological well-being requirement, it actually does." Pet. 15. Rennie therefore contends that the case should be remanded to the district court for reconsideration under *Harris* v. *Forklift Systems, Inc.*, 114 S. Ct. 367 (1993), which rejected that standard. Pet. 18-19. Rennie also points out that the Sixth and Seventh Circuit case authority cited by the court of appeals was subsequently overruled by *Harris*. Pet. 12-19.

Rennie correctly points out that the circuit case law cited by the court of appeals has been overruled by *Harris*, to the extent it required a plaintiff to establish psychological harm in order to prevail on a sexual harassment claim. The Seventh Circuit itself has expressly recognized the impact of *Harris* on its earlier precedents. In *Saxton* v. *American Telephone & Telegraph Co.*, No. 92-1545 (7th Cir. Dec. 3, 1993), slip op. 14, the court explained that "to the extent our prior cases required proof that the harassment 'cause[d] such anxiety and debilitation to the plaintiff that working conditions were poisoned,' *Scott* v. *Sears, Roebuck & Co.*, 798 F.2d 210, 213 (7th Cir. 1986), they have been overruled." The court noted "[t]o the same effect as *Scott*, see *Daniels* v. *Essex Group, Inc.*, 937 F.2d 1264, 1271 (7th Cir. 1991); *Swanson* v. *Elmhurst Chrysler Plymouth, Inc.*, 882 F.2d 1235, 1238 (7th Cir. 1989), cert. denied, 493 U.S.

1036 (1990); *Brooms* v. *Regal Tube Co.*, 881 F.2d 412, 418-419 (7th Cir. 1989)." *Id.* at 14 n.12.

Petitioner Rennie is not correct, however, in her claim that the court of appeals' ruling depends on the psychological well-being requirement such that a remand is necessary. The court of appeals anticipated this Court's ruling in *Harris*, and specified that its holding depended on the fact that Rennie "also failed to establish that she 'was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors *or other verbal or physical conduct of a sexual nature* . . . .'" Pet. App. A12 n.5 (emphasis added), quoting *Swanson*, 882 F.2d at 1238. The requirement that a sexual harassment claim of hostile work environment be rooted in conduct of a sexual nature is inherent in the nature of the claim and *Harris* did not undermine that factor. In Rennie's case, the court of appeals merely reaffirmed the district court's conclusions that the only conduct of a sexual nature was one off-color joke and one discussion concerning a strip bar and that these "isolated incidents fall short of the requisite level of hostility or pervasiveness needed to establish a hostile work environment violation under Title VII." Pet. App. A13. In short, the court of appeals provided sufficient analysis of Rennie's claim to preclude the need for a remand. Unlike *Harris* which the district court found to be a "close case," *Harris*, 114 S. Ct. at 371, the courts below made clear that Rennie's case is not close.

c. Petitioner Rennie also challenges the rejection of her retaliation claim, contending that the placement of the blackboard between Rennie and the course instructor during the second practical exam

constituted adverse treatment. Pet. 19-21. She argues that "retaliatory harassment" is illegal unless it is so trivial that an ordinary person would not be deterred from speaking out. Pet. 21.

The courts below did not reject the claim because the conduct was too trivial, but rather because it was not adverse. The court of appeals explained that "[w]hile we recognize that the placement of the blackboard might be classified as different treatment, albeit a slight difference, we hold that it did not rise to the level of adverse treatment because the instructor still made himself available to answer questions and the placement of the blackboard was an attempt to respond to [Rennie's] concern that [the instructor] was staring." Pet. App. A15. The court of appeals emphasized that this determination relied in large part on the credibility determination of the district court in regard to testimony by Rennie, the instructor, and the other student in the classroom at the time. This credibility assessment does not warrant further review by this Court.

2. a. In regard to the sanctions imposed sua sponte by the court of appeals, petitioner Darst argues (Pet. 22-27) that the court of appeals' initial statement in its August 27, 1993, opinion about sanctions indicated the court had already decided to impose them. Darst contends that he therefore was not afforded adequate notice and that an insurmountable burden was imposed on him.

The requirement that a person be given reasonable notice and an opportunity to respond prior to sanctions being imposed is set forth in Seventh Circuit

Rule 38.[2] Federal Rule of Appellate Procedure 38 does not include an express prior notice requirement.[3]

Although the court of appeals indicated in its initial August 27, 1993, opinion that it was "of the opinion" that Rule 38 sanctions were appropriate and directed that counsel pay costs and fees, the court there also explicitly recognized that it had to provide "reasonable notice to counsel that *we are contemplating sanctions* and give an opportunity to respond," which it then gave. Pet. App. A19 (emphasis added). The court afforded Darst 15 days in which to respond and Darst submitted a 29-page brief in response. Pet. App. A19. In its October 14, 1993, order, the court repeated that in its August opinion it had "stated that Plaintiff-Appellant's appeal was frivolous and that the court was contemplating sanctions" under Rule 38. Pet. App. A21. It concluded in its October order that sanctions were appropriate after having considered Darst's response. Pet. App. A21. After imposition of sanctions, Darst submitted a

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[2] Seventh Circuit Rule 38 provides:

> The court may, on its own or on motion of a party, impose sanctions on a party or an attorney as otherwise authorized by law. Before imposing sanctions the court will give reasonable notice to the person or persons that it is contemplating sanctioning and give those persons an opportunity to respond.

[3] Federal Rule of Appellate Procedure 38 provides, in its entirety:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

15-page petition for rehearing which was treated as a motion for reconsideration and denied.

Thus, the court of appeals treated its initial opinion as constituting the notice required by Seventh Circuit Rule 38 that it was contemplating sanctions and it subsequently imposed sanctions after considering Darst's response. The court's interpretation of its own initial opinion as satisfying the circuit's formal notice requirement does not warrant review by this Court.

b. Darst also seeks review by this Court of the sanctions based on his contention that he "did not commit the act alleged in the opinion." Pet. 27-29.

The court of appeals has discretion under Federal Rule of Appellate Procedure 38 to award sanctions in the case of a frivolous appeal "as a matter of justice to the appellee and as a penalty against the appellant." *Burlington Northern R.R.* v. *Woods*, 480 U.S. 1, 4 (1987), quoting Advisory Committee Notes on Fed. R. App. P. 38, 28 U.S.C. App. at 492. This fact-based determination by the court of appeals does not merit review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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